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ABSTRACT

This report contains digests of 179 court decisions covering legal issues of particular importance to teachers. The case digests are arranged under (1) certification and eligibility, (2) salaries, (3) contracts, (4) tenure, (5) school desegregation, (6) civil rights, (7) teacher/school board negotiation, (8) leaves of absence, (9) liability for pupil injury, and (10) miscellaneous. Cases relating to teacher tenure are most numerous, with cases relating to professional negotiation ranked second. (Author/JF)

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RESEARCH REPORT 1972-R6

The Teacher's Day in Court: Review of 1971

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EA 004 620

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FOREWORD

THE COURTS have been and continue to be the forum in which teachers seek vindication of their rights. As times change, so do the legal issues concerned with school policies and practices that affect teachers. Thus, recent court cases have posed questions of constitutional dimensions relative to civil and political rights of teachers, academic freedom, due process for nontenure teachers, maternity leaves, and the use of tests in hiring, retention, and promotion of teaching staff. What the courts have decided on these questions as well as others is of importance to the entire teaching profession, for the rulings have an impact on the rights and responsibilities of teachers that extends beyond the immediate parties to an action.

This report contains the digests of decisions of state and federal courts published during the 1971 calendar year where teachers and other certificated school personnel were plaintiffs or defendants.

The report was prepared by Jeanette G. Vaughan, formerly with the Research Division as a Senior Staff Associate. The study was directed by Frieda S. Shapiro, Assistant Director.

Glen Robinson
Director, Research Division

INTRODUCTION

THIS REPORT contains digests of 179 court decisions with legal issues of particular importance to teachers. The material in this compilation comes from judicial decisions published during the 1971 calendar year in the *National Reporter System.* While most of the decisions summarized here were rendered in 1971, cases decided earlier, but not in print until sometime in 1971, are also included. With some exceptions, litigants in these cases, whether plaintiffs or defendants, were teachers or other professional school personnel in the public elementary and secondary schools and publicly financed institutions of higher learning. The number of reported decisions in 1971 exceeded those reported in 1970 by 36, with this increase mainly the result of lawsuits by nontenure teachers to obtain procedural due process rights.

The 179 decisions originated in 39 states. All but four are of a civil nature. The exceptions are two decisions from New Jersey and one from New York where teachers were cited for criminal contempt of court for violating injunctions against strikes. The other noncivil case involved faculty members at the State University of New York at Buffalo who succeeded in obtaining a reversal of a judgment of criminal contempt of court for violating an injunction against occupation of campus buildings. In all, 119 decisions are products of state courts: 28 from the highest tribunal of the state where the action was initiated, 60 from intermediate appellate courts, and 31 from trial courts whose decisions are systematically published in the reference source used in the preparation of this report. The federal courts were represented by 60 decisions: 22 decisions from federal circuit courts of appeal and 37 decisions from federal district courts. The Supreme Court of the United States rendered one decision concerning teachers in 1971. This involved the Florida loyalty oath required of teachers.

As in other years, New York courts produced the most decisions. This year there were 48 from New York, followed by California with 11 and Florida with 10.

The case digests are arranged under the following 10 topic headings: (a) certification and eligibility, (b) salaries, (c) contracts, (d) tenure, (e) school desegregation, (f) civil rights, (g) teacher/school board negotiation, (h) leaves of absence, (i) liability for pupil injury, and (j) miscellaneous. When there is more than one case from a state under the same topic, the cases are listed alphabetically by title. Table 1 classifies the 179 decisions by state and major issue raised. Cases with more than one issue are cross-referenced.

As in previous years, issues relating to teacher tenure were again the most numerous with a record-breaking number of 81 cases appearing in this category in 1971. Included in this broad category are cases raising issues of due process rights for teachers without tenure status. Because of the large number of these cases that involve either probationary teachers in tenure states or teachers in states without tenure protection, the topic has been subdivided into two sections. The first section contains those cases involving tenure employees and those cases where the question was raised as to whether the employee did or did not have tenure. The second section contains the decisions concerning the nontenure teacher.

Professional negotiation again ranked second, with 26 cases this year. The 14 cases in the miscellaneous section include loyalty, retirement, dual office holding by teachers, and challenges to laws or policies requiring teachers to live in the district that employs them.

The summary that follows describes some of the major issues and significant cases presented in this report.

School Desegregation

In 1971, as in past years, school desegregation cases initiated on behalf of black students dealt with issues relative to faculty desegregation. Since teachers themselves were not litigants in these cases, they are not reported in this publication.

This report includes those cases involving school desegregation where teachers were concerned directly as litigants. Among these, racial discrimination in the re-employment, retention, promotion, and hiring practices were issues raised by black teachers and black principals. In *Lee v. Macon County Board of Education,* a case where

TABLE 1.–MAJOR ISSUES IN CASES INVOLVING TEACHERS IN 1971

State	Certification and eligibility	Salaries	Contracts	Tenure[a]	School desegregation	Civil rights	Teacher/school board negotiation	Leaves of absence	Liability for pupil injury	Miscellaneous	Total cases
1	2	3	4	5	6	7	8	9	10	11	12
Alabama				1	4	1					6
Arizona				1							1
Arkansas		1	3	2	1						7
California	1		1	5			1			3[b]	11
Colorado				3							3
Connecticut						1					1
Delaware				1							1
Florida				7	1					2[c]	10
Georgia	1			1	1	1		1			5
Idaho			1								1
Illinois		1		4							5
Indiana					1		1				2
Iowa				1							1
Kansas				1							1
Kentucky							1		2		3
Louisiana				3	1	1			1	1[d]	7
Maine				2							2
Maryland						1			1		2
Massachusetts		1		3			1				5
Michigan				5						1[e]	6
Minnesota				1			1				2
Mississippi					4	1					5
Missouri			1	1			1				3
Nebraska				1							1
New Hampshire				3						1[c]	4
New Jersey				1			2			1[f]	4
New Mexico				4							4
New York	8	4		12		1	16	3	1	3[g]	48
Ohio				3				1			4
Oregon			1								1
Pennsylvania				2							2
Rhode Island						1	1				2
Tennessee				3						1[f]	4
Texas			1			1				1[f]	3
Vermont				1							1
Virginia				2				1			3
Washington				2							2
Wisconsin				4			1				5
Wyoming				1							1
Total	10	7	8	81	13	9	26	6	5	14	179

[a]Includes tenure-type continuing contracts and cases involving the rights of nontenure teachers.
[b]Two cases involve loyalty oaths and the third concerns a teacher's federal income tax return.
[c]One case contests a loyalty oath and the other the use of an examination for teachers.
[d]Suit concerning payment of accrued unused sick leave as a retirement benefit.
[e]Involves a board policy requiring residence in the school district of employment.
[f]Issue is the right of teachers to hold public office concurrently with school employment.
[g]One case involves a reduction in force, the second retirement, and the third is a criminal action against faculty members.

black principals were demoted as a result of school closings in the process of converting from a dual to a unitary school system, a federal district court ordered that the demoted black principals who had chosen to remain in the school system be offered the first principalship vacancies that arose; further, that they be paid as a salary supplement the difference between their current salaries and the salaries they would have received as principals until such time as they were offered a promotion to the position of principal. In another case, the U.S. Eighth Circuit Court of Appeals found that an Arkansas school system had unlawfully discriminated against four black teachers who were not rehired after the schools were desegregated and ordered the board to notify these teachers of present and future vacancies within the system and offer the positions to them without comparing them with other applicants.

The use of the Graduate Record Examination and the National Teacher Examinations in employment or retention of teachers was challenged as racially discriminatory in two cases. In the first case, the National Education Association and the Mississippi Teachers Association joined nine black teachers who were refused re-employment in the Starkville Municipal Separate School District, in a suit to enjoin a school-board policy requiring in-service teachers and applicants for teaching positions to achieve a minimum score on the Graduate Record Examination or a master's degree as a precondition for retention or employment in the school district. The policy was adopted at a time when the district was under pressure to desegregate its schools. The U.S. District Court of the Northern District of Mississippi declared that this board policy was unconstitutional in that the cut-off scores of the examination established a racial classification. The court ruled further that the use of the Graduate Record Examination violated the due process and equal protection clauses of the Fourteenth Amendment for the reason that the examination was not job-related to the extent that it determined teacher competency and because, as used, the examination disqualified a disproportionate number of black teachers and applicants. Accordingly, the school district was enjoined from utilizing the examination in the selection of in-service teachers and the hiring of new applicants and those plaintiff-teachers who were not rehired as a result of the policy were entitled to damages and re-employment. This decision was upheld in June 1972 by the U.S. Fifth Circuit Court of Appeals.

In *Baker v. Columbus Municipal Separate School District*, a case with plaintiffs and issues parallel to those in the Starkville case, the same federal district court held that a school board requirement that all first-year teachers and applicants for teaching positions attain a 1000 minimum composite score on the National Teacher Examinations as a prerequisite to employment violated the Fourteenth Amendment.

Use of Tests

Besides the challenges to the use of the Graduate Record Examination and the National Teacher Examinations for retention and initial hiring in the context of school desegregation, teachers and teacher groups in other lawsuits contested the use of examinations for purposes of staff appointments, promotions, or salary. A Florida state court ruled that since a 1967 state law deleted the requirement that teachers achieve a minimum score on the National Teacher Examinations for the purpose of certification and appointment on continuing (tenure) contracts, a local school board could not impose this requirement on nontenure teachers as precondition to re-appointment.

In *Chance v. Board of Examiners and Board of Education of the City of New York*, two teachers, one black and one Puerto Rican, brought a class suit charging that the competitive examinations for licensing and appointment to supervisory positions, such as principal and assistant principal, discriminated against them. A federal district court concluded on the record before it that the examinations have the effect of discriminating against qualified black and Puerto Rican applicants and that the examinations could not be validated as job-related. Therefore, the court issued a preliminary injunction against conducting further competitive tests of the type here challenged and from promulgating eligibility lists based on them, pending a trial on the merits. This decision was upheld by the U.S. Court of Appeals for the Second Circuit.

Tenure and Due Process Issues

The 1971 decisions grouped under the tenure category cover a variety of legal issues of both a substantive and a procedural nature. For example, courts were called upon to construe state tenure laws, to determine if there was statutory cause for and sufficient evidence to support demotion or dismissal of tenure teachers or if, as some teachers contended, dismissals were because of their civil rights activities or the exercise of First Amendment rights of speech, petition, and association, or to decide if procedural irregularities resulted in unfair treatment of teachers.

An outstanding and a much litigated issue in 1971 in the federal courts concerned nontenure teachers at the elementary, secondary, and higher education levels. The issue was whether, in the absence of statute, nontenure teachers are constitutionally entitled to procedural due process rights upon nonrenewal of their contracts. As the decisions summarized in this report show, the federal courts were divided on this question. The U.S. Sixth Circuit Court of Appeals in *Orr v. Trinter* held that, absent statutory rights, a nontenure teacher need not be afforded procedural due process upon nonretention. On the other hand, the U.S. Seventh Circuit Court of Appeals affirmed a Wisconsin federal district court decision in *Roth v. Board of Regents* which held that under the due process clause of the Fourteenth Amendment a nontenure professor whose contract was not renewed (after his first year of probation) was entitled to substantive protection against arbitrary nonretention. The lower court had concluded that "the decision not to retain a professor employed in a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason." In addition, the nontenure professor was entitled to procedural due process safeguards, the minimal requirements of which included a statement of reasons for considering the nonrenewal and a hearing. In affirming this decision, the Seventh Circuit Court concluded that the district court properly considered the adverse effect that nonretention is likely to have on the career interest of the professor. Another reason for upholding the *Roth* principles, the appellate court said, was to prevent the stifling of First Amendment freedoms.

Under reasoning that differed from *Roth*, the U.S. Fifth Circuit Court of Appeals ruled in *Ferguson v. Thomas* (430 F.2d 852 (1970)), that a nontenure teacher who has an "expectancy of re-employment" and whose contract is not renewed is entitled to notice of the cause and to a meaningful opportunity to be heard in his own defense. In further amplifying due process rights of nontenure teachers, the Fifth Circuit Court in the Texas case of *Sindermann v. Perry* (430 F.2d 969 (1970)), held that a nontenured teacher who lacks an expectancy of re-employment would still be entitled to a hearing but under different procedures. In such a situation, the teacher must bear the burden of initiating the proceedings for review of the refusal of the employing board to rehire him and the burden of proving that wrong had been done. In *Sindermann*, the Fifth Circuit Court ruled further that the district court should not have dismissed the action of the Texas junior college teacher without hearing his claim that his nonretention unconstitutionally infringed on his free speech right. The teacher had alleged in his complaint that he was nonrenewed because of his testimony before legislative committees and his other public statements critical of the Board of Regents' policies.

In January 1972, the Supreme Court of the United States heard appeals brought by the colleges from the *Roth* and *Sindermann* decisions. In simultaneous decisions handed down on June 29, 1972, the Supreme Court held 5 to 3 in the *Roth* case that a nontenure teacher employed under a one-year contract has no constitutional right to a statement of reasons and a hearing on the state institution's decision not to rehire him unless he can show that the nonrenewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or formal contract. The Supreme Court said that the interest of liberty would be implicated and the requirements of due process would apply where the state, in declining to rehire a teacher, makes any charges against him "that might seriously damage his standing and associations in the community" or imposes on him "a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities." Further, procedural due process safeguards would be applicable where the teacher's property interest in employment supports a legitimate claim for entitlement to re-employment. In *Roth*, the Supreme Court concluded that since the teacher had not shown that he was deprived of liberty or property protected by the Fourteenth Amendment, summary judgment in his favor on the issue of procedural due process should not have been granted. Accordingly, the decision of the U.S. Court of Appeals for the Seventh Circuit was reversed. (40 U.S. Law Week 5079)

In *Sindermann*, the Supreme court ruled 5 to 3 that the lack of a formal contractual or tenure right to re-employment, taken alone, did not bar the teacher's claim that nonrenewal of his contract violated his free speech right under the First and Fourteenth Amendments. On this issue, the Supreme Court agreed with the Fifth Circuit that the district court erred in not hearing this claim. The Supreme Court disagreed with the Fifth Circuit Court insofar as it held that mere subjective "expectancy" of tenure is protected by procedural due process. However, the Supreme Court held that the teacher's allegation that the college had a *de facto* tenure policy, arising from rules and understandings officially promulgated and fostered, entitled the teacher to prove the legitimacy of his claim to job tenure and upon such proof, the college was obligated to afford him a requested

hearing where he could be given grounds for his nonretention and challenge their sufficiency. Therefore, the judgment of the Fifth Circuit Court remanding the case to the district court was affirmed.

First Amendment Issues

A claim often made by teachers whose employment is terminated is that in reality the school board action is in retaliation for the exercise of rights of free speech, petition, and association protected by the First Amendment. Depending upon the facts, judicial redress against infringement of First Amendment rights was obtained by some teachers but not by others as the following examples illustrate: Where there was evidence that a New Hampshire nontenure teacher was not reemployed on account of his activities as chief negotiator for his local teachers association and on the basis of uninvestigated student complaints and unverified rumors without regard to their truth or falseness, a federal district court held that the teacher's dismissal violated the First and Fourteenth Amendments. In view of this, the teacher was entitled to immediate reinstatement and damages for lost salary, and to have any notation of nonrenewal of his contract expunged from his record. In another case, the U.S. Fifth Circuit Court of Appeals held that employment at a public college cannot be denied a teacher in retaliation for the assertion of his First Amendment right of free speech. Prior to employment at the college, the teacher had testified as an expert witness for the defense on the literary merits of a film involved in a criminal obscenity prosecution, a factor allegedly causing the cancellation of his employment contract. The teacher was ordered reinstated pending a trial on the merits. On the other hand, the U.S. Eighth Circuit Court of Appeals upheld findings of a federal district court in Missouri that the termination of employment of a probationary teacher was the result of good faith discretion of the school authorities and was not, as the teacher contended, for a constitutionally impermissible reason—the writing of a letter to a state legislator. The letter in question criticized the state department of education for failing to allot funds for a summer program to a special education project in which the teacher worked and asked the legislator for assistance in obtaining funds. It was written on official school-board stationery and created the impression that the teacher was speaking for the board which she had no authority to do. In the circumstances, the appellate court held that the letter was not protected speech under the First Amendment.

Academic freedom was an issue in the discharge of unbecoming conduct of a Massachusetts teacher. The discharge stemmed from his use of a taboo word during an 11th-grade class discussion of a novel in which the teacher introduced the subject of society and its ways as illustrated by taboo words. The U.S. Court of Appeals for the First Circuit affirmed the decision of the district court that the teacher be reinstated but it rejected the guidelines the district court had laid down for permissible teaching methods, saying that there was "no substitute for a case-by-case inquiry into whether legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech."

In other issues concerned with First Amendment rights of teachers, a federal district court ruled that the refusal of an elementary-school teacher to recite or lead the class in the Pledge of Allegiance required as part of the morning class exercise was protected expression under the First Amendment which could not be forbidden at the risk of loss of employment. The court ordered the teacher reinstated pending final disposition of the civil rights action the teacher had instituted. In another action a science teacher and his high-school son successfully challenged a recently enacted Maryland statute requiring all students and teachers, except those objecting for religious reasons, to stand, salute the Flag and recite in unison the Pledge of Allegiance. Failure to comply was punishable. The teacher objected to the Flag salute requirement because he could not "in good conscience" force patriotism upon his classes and because he believed that being forced to salute the Flag eliminated his right to freely express his own loyalty to the United States. Maryland's highest court held that the compulsory Flag salute law and its punishment provisions were unconstitutional as an abridgement of free speech under the First Amendment.

A question before the Supreme Court of the United States in 1971 was the constitutionality of the Florida loyalty oath statute. In a suit brought by a teacher, the federal district court upheld two portions of the oath, but declared unconstitutional the portions relating to membership and the giving of aid to the Communist party and membership in organizations believing in the overthrow of the state or federal governments. The Supreme Court struck down this portion of the oath. The only portion held constitutional by the Supreme Court was the section requiring applicants to pledge to support the state and federal constitutions.

Of significance also is an opinion rendered in 1969 but not officially published until 1971 in

which a federal district court in Texas ruled that a school-board regulation which completely banned all political activities by teachers except voting was inconsistent with the First Amendment guarantees of freedom of speech, press, petition, and assembly. The court decided that the action of the school board in refusing to renew the contract of a teacher, due at least in part to his political activities in violation of the regulation, was an infringement upon the teacher's constitutionally guaranteed rights not to be punished by the state or suffer retaliation at its hand because of his persistence in the exercise of his First Amendment rights.

Other Constitutional Issues

Constitutional rights of teachers in contexts besides those already mentioned above were in issue in other cases decided in 1971. Among these were cases challenging residency rules and maternity leave policies. The New Hampshire Supreme Court declared invalid a city ordinance which required teachers and classified city employees to live within the city limits on the ground that the ordinance restricted the fundamental right guaranteed to every citizen under the state and federal constitutions to live where he chooses and to travel freely.

In the lawsuits by female teachers contesting school-board maternity rules, one federal district court concluded that the Atlanta school board policy which granted maternity leave to tenure teachers but denied it to nontenure teachers was arbitrary and had no rational basis. The court declared that the policy was violative of the equal protection clause of the Fourteenth Amendment and ruled that the board must grant maternity leave to tenure and nontenure teachers alike.

In two other cases, pregnant teachers employed in Virginia and Ohio school systems sought to enjoin the enforcement of maternity regulations which required them to take leave—in one system, by the end of the fourth month of pregnancy and in the other system by the end of the fifth month of pregnancy. In both instances the teachers claimed that the maternity regulations violated their constitutional rights by discriminating against them as women, thereby violating the equal protection clause of the Fourteenth Amendment. A federal district court in Virginia invalidated the mandatoy maternity leave regulation under attack, holding that the regulation denied pregnant women equal protection of the laws because it treated pregnancy differently than other medical disabilities without any rational basis for the distinction. On the other hand, a federal district court in Ohio found the maternity leave regulation to be entirely reasonable and concluded that no constitutional rights of the teachers had been violated. Both of these decisions have been appealed.

Professional Negotiation Issues

Recurrent and new legal issues appeared in decisions relating to negotiation between teacher groups and school boards. In accord with the general rule, courts in California and Kentucky held that teachers and other public employees have no right to strike in the absence of a statute giving them this right. Individual teachers and their organizations in Massachusetts, New Jersey, and New York lost appeals from jail sentences and fines for criminal contempt for violating injunctions against strikes. Other New York decisions upheld penalties imposed against teachers who struck in the form of loss of two day's pay for each work day missed as provided for by the Taylor law. Further, this law, which prohibits strikes and imposes sanctions, was declared to be constitutional. In a similar vein, the Minnesota Supreme Court upheld the constitutionality of a state law which provides that teachers and other public employees who strike automatically abandon and terminate their employment, and if subsequently reappointed, their compensation cannot exceed their pre-strike salaries and cannot be increased within one year of the reappointment. School-board resolutions resulting from agreement with Minneapolis teachers associations to pay rehired teachers for salary lost during a strike as well as salary increments were held to be void.

In several New York cases, courts were asked to resolve differences of opinion between school boards and teacher groups on whether certain disputes were arbitrable under the terms of their negotiated agreements. The courts were consistent in ordering the school boards to proceed with arbitration. In one New York case, a school board sought a judgment declaring illegal certain provisions in a contract it had negotiated with a teachers association. Four of the provisions had obligated the board to pay certain monetary benefits to teachers and a fifth provided for the arbitration of grievances relating to tenure teachers. The New York Court of Appeals, the highest court in the state, ruled that the provisions in the agreement which the school board challenged were valid since each provision constituted a term or condition of employment as to which the board was required to negotiate under the Taylor law. The court

stated that the obligation of the board to bargain on all terms and conditions of employment is a broad and unqualified one and should not be limited except in cases where another applicable statute is explicitly prohibitory. In holding valid the grievance procedure providing for binding arbitration of disputes involving discipline and dismissal of tenure teachers, the court said the school board was not prohibited from agreeing to this procedure even though the state tenure law provides procedures whereby a tenure teacher may challenge an adverse action of the school board.

In another arbitration dispute, the Rhode Island Supreme Court held that there is authority under the state law governing school board/teacher relations for binding arbitration of grievances in negotiated agreements. Consequently, the Providence school board was bound to submit to binding arbitration the issue of severance pay at retirement based on unused sick leave.

An issue presented in a Wisconsin case was the legality of the difference in treatment of members of majority and minority teacher groups in a negotiated agreement. The Wisconsin Supreme Court held that a clause in a negotiated agreement which provided teachers as a matter of right time off with pay only for attendance at the conventions of the exclusive bargaining agent while making minority union members dependent on a favorable disposition of the school board for days off with pay for their convention was discriminatory treatment in violation of state law. According to the court, discrimination occurred because the clause had the "effect of discouraging membership in the minority union by affecting the terms and conditions of their employment."

CERTIFICATION AND ELIGIBILITY

California

Alford v. Department of Education
91 Cal. Rptr. 843
Court of Appeal of California,
Second District, Division 1,
December 29, 1970.

The state board of education revoked a teacher's credential in the class of kindergarten-primary life diploma and refused to grant her application for a general pupil services credential. The teacher appealed to the trial court which refused to review the decision of the board. The present appeal followed.

The teacher had been employed by the Los Angeles school district on a continuous basis except for periods of sick leave from 1951 until her resignation in 1965. Two of the instances of sick leave involved hospitalization in a state institution where she was diagnosed as "schizophrenic reaction-paranoid type." After her resignation the teacher applied for the additional credential. This application was denied, and an accusation was filed seeking revocation of the credential that the teacher did hold.

The accusation alleged that the teacher had a history of mental or emotional instability and that she was currently suffering from this disability. The evidence to support the accusation was based upon the two previous confinements for mental illness and a more recent psychiatric examination. The evidence offered by the teacher substantially agreed with the evidence submitted by the state board. The board then revoked the teacher's certificate.

In her appeal to the trial court the teacher sought to call a psychiatrist different from the expert witness she had used before the board, contending that at the time of the hearing before the board she did not have the funds to employ a psychiatrist more skilled in the art of "forensic medicine." The trial court denied this request. Before the appellate court the teacher contended that the denial of the request to introduce the additional psychiatric evidence was error; that the trial court was incorrect in upholding the board in that there was no substantial evidence to support the determination because there was no showing that her mental illness interfered with her work as a teacher; and that the state board improperly proceeded to revoke her certificate by not using the appropriate statutory procedure.

The appellate court found that there was substantial medical testimony to the effect that the teacher was unfit to teach and that her certificate had been properly revoked according to state law. The appellate court did not agree with the argument of the teacher that the board must show actual misconduct or dereliction in the performance of her duties. The case of *Morrison v. State Board of Education* (82 Cal. Rptr. 175) cited by the teacher to support her position was distinguished by the court from the present controversy since in the former case no evidence was offered regarding the teacher's unfitness to teach while in this instance there was direct psychiatric testimony that the teacher was unfit to perform the duties authorized by her certificate.

The court also held that the additional testimony sought to be introduced by the teacher was properly excluded by the trial court since there was no showing that it could not have been produced before the hearing. The judgment of the trial court was affirmed.

Georgia

Black v. Blanchard
179 S.E.2d 228
Supreme Court of Georgia,
January 11, 1971.

Plaintiffs brought a proceeding to test the right of the county school superintendent to fill that position. The trial court ruled that the superintendent in question was qualified to serve, and the plaintiffs appealed.

Involved was a 1963 state statute which substantially increased the minimum qualifications for superintendent, but exempted from these new qualifications any person holding office on the effective date of the law or any person who had served at least one term as county school superintendent. It was conceded that the superintendent here did not meet the higher qualifications and that he was qualified to hold office under the statute only by virtue of having served continuously as superintendent of the Columbia County schools since January 1949.

The plaintiffs contended that the statute was unconstitutional in that the exemption provision violated a state constitutional provision banning enactment of any special laws in any case for which provision has been made by an existing general law. The main question before the appellate court was whether the classification fixed by the exemption provision was a valid one for the purpose of fixing qualifications of persons to be county school superintendents. The court quoted from an earlier decision that the state constitution requires a law only to have uniform operation which means that it must operate alike on all persons who come within its scope. This does not mean that it must apply universally. Based on these principles, the court was of the opinion that the statute did not violate the state constitution because it applied to every county in the state, it fixed the general rules with respect to qualifications for county school superintendent, and it allowed exceptions based essentially on experience as a county superintendent. The court noted that it was arguable that if the exceptions were not permitted, the people might be deprived of the benefit of well-experienced men who were already holding the position of county superintendent. The purpose of the statute was to secure competence in the such position, and as a matter of law it cannot be said that the classification established in the exemption provision bore no reasonable relationship to that purpose.

The court also rejected the argument of the plaintiffs that the statute denied the children in Columbia County the services of a qualified superintendent. The court held that the law did not deny to the electorate in the county the right to choose such person as they saw fit to be superintendent as long as such person met the qualifications of the law. The opinion of the trial court was affirmed.

Louisiana

Hill v. Caddo Parish School Board
250 So.2d 446
Court of Appeal of Louisiana, Second Circuit, June 22, 1971.

(See page 65.)

New York

Anonymous v. Board of Examiners of the Board of Education of the City of New York
318 N.Y.S.2d 163
Supreme Court of New York, Special Term, Kings County, Part I, November 30, 1970.

A junior high-school substitute teacher sought to prohibit the board of examiners from terminating his license for unsatisfactory physical and medical examinations. In 1965, the teacher was issued a license for substitute teaching in junior high schools subject to passing the physical and medical examination. He served in that position for three and one-half years. In 1968, the teacher applied for a different license as a substitute English teacher in the high schools, and in connection therewith he underwent a medical examination.

That examination as well as hospital records and subsequent examination indicated that the teacher was a heroin addict, that he had had and still had social and psychological problems that led to the addiction and that he was currently on a methadone maintenance program. Methadone is a substitute for heroin and, while not as debilitating, is addictive.

On the basis of the medical and psychiatric reports, the board of examiners denied the teacher's application for a new license and terminated his existing one. The reports indicated that the teacher was not fit to teach at that time or in the foreseeable future, and that methadone is still an addictive drug. The teacher introduced other evidence indicating that he was making progress in his psychiatric treatment and that he had made excellent adjustments to society.

It was the opinion of the court that the teacher had failed to establish that the action of the board in terminating his license was arbitrary and capricious in view of his undisputed drug addiction and psychological problems. Unless the standards used by the board were so irrelevant and inappropriate as to be palpably arbitrary and unreasonable, the court said, it must sustain them. The court concluded by stating that no matter how sympathetic it might be to the position of the teacher, since there was a reasonable basis for the decision of the board of examiners, the court could not substitute its judgment for the judgment of the board. Accordingly, the motion of the teacher was denied.

Board of Education of the City of New York v. Nyquist
322 N.Y.S.2d 370
Supreme Court of New York, Appellate Division, Third Department, June 24, 1971.

Beginning in 1961 the teacher was assigned as acting principal of an elementary school. This assignment was renewed annually. The teacher was, however, never appointed to the position of principal or paid the appropriate salary because she had

never passed the required examination for a license as an elementary-school principal. She had taken and failed the examination six times. In December 1969, she appealed the refusal of the board of education to grant her a license as principal to the commissioner of education. The commissioner sustained her appeal and directed the board to adjust her title and compensate her accordingly in the future. The board then brought suit to overturn this determination. The trial court held that the decision of the commissioner was not purely arbitrary since he had ruled similarly on prior appeals and dismissed the case. The board appealed.

State law does not prevent judicial review of a decision which is arbitrary or illegal, and where the commissioner makes an erroneous determination on a question of law, his decision in a legal sense is arbitrary and thus reviewable. A provision of the state constitution applicable to school districts requires that appointments and promotions be made as far as possible by competitive examination. Statute requires that the appointments in supervisory service of the New York City schools be ascertained by open qualifying examination and that appointments be made from eligibility lists. The decision of the commissioner, the court ruled, required the board to make an appointment of the employee here involved to the position of tenured principal in direct contravention of the state constitution and applicable statutes.

Accordingly, the decision of the trial court was reversed. However, since the commissioner had not yet filed an answer, relief was delayed until he did so.

Chance v. Board of Examiners and Board of Education of the City of New York
330 F. Supp. 203
United States District Court, S.D. New York,
July 14, 1971.

Two teachers, one black and one Puerto Rican, brought a class action against the board of examiners and the board of education of the city of New York. They alleged that the competitive examinations that must be passed by candidates prior to licensing and appointment to supervisory positions discriminate against black and Puerto Rican teachers and that the tests have not been validated or shown to fairly measure the skill or fitness of a candidate for the position. They alleged that this discrimination was contrary to the state and federal constitutions and sought a preliminary injunction and declaratory relief. Only the board of examiners (referred to below as the board) opposed the motion for a preliminary injunction.

State law permits New York City to provide for examinations in addition to state certification. Candidates for permanent appointment to a supervisory position in New York City must possess state certification and also meet certain minimum education and experience requirements and pass an examination procedure prepared and administered by the board for the particular position. Depending on the type of position sought, the examination includes a written portion and an oral interview. Both teachers in this case were acting as principals at the time that suit was brought. Were it not for the licensing procedures of the city, both teachers would have been appointed permanent elementary-school principals. They had state certification and had completed the educational and training requirements. One had taken the examination and failed, and the other refused to take the examination. Both teachers were selected for their present positions by their respective community school boards under New York's decentralization law.

The court found that of the approximately 1,000 principals of all levels of schools in New York City only 11 were black and only one was Puerto Rican. The figures for assistant principals were 7 percent black and 2 percent Puerto Rican. The two teachers alleged that the primary reason for the lack of minority supervisors was the testing procedure. The evidence presented to the court on this point indicated that for all principalships, white candidates passed the examination at almost 1½ times the rate of black and Puerto Rican candidates, for assistant principals of junior high schools, whites passed at double the rate of blacks and Puerto Ricans. Additionally, since the traditional route to a principalship is through the assistant principal position, the difference in pass rates became even more substantial. The court also found that of the five largest school systems in the country, New York had by far the lowest percentage of minority group supervisors.

The court concluded that the evidence established that the procedures of the examinations for licensing of supervisory personnel in New York City "do have the *de facto* effect of discriminating significantly and substantially against qualified black and Puerto Rican applicants." However, this discrimination standing alone, the court said, would not entitle the plaintiffs to relief if the examinations could be validated as relevant to the requirements of the positions for which they were given, that is, whether they are "job-related."

As to the validity of the tests, the plaintiffs argued that the test is useful only if it has predictive validity rather than content validity which is primarily designed to measure whether a candi-

date has learned a defined body of knowledge rather than for the purpose of determining how well he will do on the job. The board took the view that content validity was more important in determining a candidate's proficiency or capacity to perform as a principal. In this regard much evidence was taken, and expert witnesses appeared for both sides. The court found that despite the board's aims to achieve validity, reliability, and objectivity, its methods to implement the techniques and procedures adopted in principle were insufficient to insure that the tests would be valid in content, much less in predictiveness. The court felt compelled to conclude that while the board adopted procedures designed for content validity, it did not appear in practice to have achieved that goal. The test questions, according to the court, had little relevance to the qualities expected of a school supervisor. They were aimed at testing the candidate's ability to memorize rather than the qualities normally associated with a school administrator. The court said that this "ability to memorize and regurgitate laundry lists of bad answers is not, we hope, a true test of a candidate's qualifications for a supervisory position." The court made no finding as to the content validity of the oral part of the examination, but did say that the procedure on this part leaves open the question of whether white candidates are not being favored unconsciously by committees of examination assistants who have been entirely or predominantly white. The court did find that the examinations were conducted in an objective manner.

Concluding that the examinations did discriminate against black and Puerto Rican applicants and that they were not valid from a content point of view, and were not job-related, the board was preliminarily enjoined from conducting further examinations of this type and from promulgating eligibility lists based on these examination pending a trial on the merits.

NOTE: This decision was upheld by the U.S. Court of Appeals for the Second Circuit. (40 *U.S. Law Week* 2743, April 5, 1972.)

Council of Supervisory Associations of the Public Schools of New York City v. Board of Education of the City of New York
318 N.Y.S.2d 220
Supreme Court of New York, Special Term, Kings County, Part I, January 26, 1971.

The Council of Supervisory Associations brought a proceeding challenging the action of the board of education in appointing principals of intermediate schools without regard to the eligibility list drawn up for principals of junior high schools.

In 1965, New York City proposed to alter the structure of its school system to a system of elementary, intermediate, and high schools, divided initially on a 5-3-4 year basis and ultimately on a 4-4-4 year system. The state board of regents amended the regulations of the state commissioner of education to permit this experiment, including granting approval to the school board to employ an appropriate licensed teacher "for any teaching assignment, within the scope of the experiment, for which the teacher is deemed, by the Superintendent, or other legally authorized body, qualified by education and experience." By the time this case was heard 40 intermediate schools had been created and had started on some portion of the new curriculum designed for these schools.

It had been the practice of the board of education to make temporary assignments of principals of these intermediate schools from the existing junior high-school principals list. The list had been promulgated prior to the adoption of the policy of reorganization of the schools.

In April 1970, a principal vacancy occurred at one of the intermediate schools located within the confines of a community board of education. The community board sought to appoint to the position a teacher who was not licensed as a junior high-school principal and was not on the junior high-school list. The teacher was certified as an elementary-school principal and had been serving as an acting assistant elementary-school principal for four years.

The Council contended that the existing list for the junior high-school principals was intended to serve interchangeably and exclusively for appointment to either a junior high school or an intermediate school, and, therefore, the vacancy at the intermediate school must be filled within six months by a person whose name appeared on the list or by transferring an appointed junior high-school principal. It was further claimed that the appointment of the teacher as acting principal for this vacancy violated a resolution of the board of education providing requirements for the selection of acting principals.

The court found that an intermediate school was different from a junior high school in the age of the pupils, the scope of the curriculum, and the aims of the school. In sum, the court said, "the intermediate school is a unique field of view in an experimental stage and is not a junior high school." Nor did the court find the intermediate school to be a junior high school as defined by the regulations of the commissioner or board bylaws.

Considering that the eligible list for junior high-school principals arose at a time when the intermediate school was not even planned, the court concluded that the list was not intended to be the eligible list for intermediate schools. Also, the board of education suspended its bylaws relating to appointment of personnel and authorized the making of "such assignments of personnel as are required to accomplish the aforesaid program, including assignments of junior high school personnel." The court noted that this resolution merely permitted but did not *require* the assignment of junior high-school personnel to the intermediate schools. The court concluded that there was no appropriate eligibility list for appointment as intermediate school principal and at most the junior high-school list was an optional one.

The court also concluded that the qualifications of the teacher in question did meet the requirements of the board of education for appointment as acting principal of the intermediate school. The petition of the Council was dismissed.

Council of Supervisory Associations of the Public Schools of New York City v. Board of Education of the City of New York
324 N.Y.S.2d 778
Supreme Court of New York, Special Term, New York County, Part I, September 2, 1971.

The Council of Supervisory Associations sought a temporary injunction to bar the New York City board of education from permitting an allegedly unlicensed person to act as a public-school principal. The case arose when a vacancy occurred at an elementary school under the jurisdiction of Community School Board No. 3. At that time there were 215 people on the eligible list for the vacancy but the community board declared that "none was found qualified." To accommodate to the desires of the community board, the board of education transferred to the position for payroll purposes only a person on medical leave. Since he was unable to serve, the community board's nominee was appointed as acting principal. The acting principal held state certification as a secondary-school principal and had one year of supervisory experience, but he was not licensed by the city and was not on the eligible list.

At the time the court decided this case, there was no longer an eligible list for elementary-school principals, the same having been abolished by statutory enactment, and all persons on the list were deemed appointed as of April 1, 1970, with these persons receiving the higher pay and the title while awaiting assignments to vacancies that would arise. The Council alleged that several of these persons were serving as auxiliary principals in the local district while the position of principal was held by an unqualified person.

The court recognized the problem in filling educational positions and noted that various devices had been employed by the board of education to grant greater flexibility to the community boards in making appointments by giving new names and titles to vacant positions. One of these is the appointment of an acting principal. Under the bylaws of the board of education certain classes of persons are eligible for appointment as acting principals, including persons with state certification and one year of supervisory experience. It was under this provision that the acting principal was appointed here. Thus, it appeared that the letter of the law had been complied with in appointing the acting principal in this instance. While the Council charged "that this is a transparent attempt to circumvent the true guiding spirit of the law," the court was unable to find "in view of the Court of Appeals directive to accord a considerable degree of leeway to the experiments of the Board of Education, that there has been such a flagrant and arbitrary flouting of the law that a temporary injunction should issue." Furthermore, since the appointment of the acting principal all eligible persons on the list had been given the rank and title of principal, the only complaint the Council could make on their behalf was that one of their number was being deprived of the assignment at the particular school which assignment was still the function of the board. Accordingly, the application for a preliminary injuction was denied.

Henock v. Bergtraum
321 N.Y.S.2d 1
Supreme Court of New York, Appellate Division, Second Department, May 17, 1971.

In September 1968, certain teachers took a competitive examination for the position of junior high-school assistant principal in New York City. A ranked list resulting from this examination was promulgated on July 15, 1969. Subsequently, the board of education announced that the list would be treated as a qualifying list only. The teachers sued to enjoin the board from making this conversion from competitive to qualifying.

At the time that the teachers took the examination, supervisory appointments had to be made from the first three positions on a ranked list. However, effective April 30, 1969, prior to the promulgation of the list here involved, that section of the law was amended to delete the requirement

that supervisory personnel be appointed from a competitive list. Nothing was substituted for the deletion, nor was any provision made for the treatment of the existing list or those not yet promulgated. At the same time, the New York City Decentralization Act was passed, which provided that supervisory appointments be made from a qualifying list. Because of the different effective dates of the two acts, there was a period when there was no legislative direction as to how appointments were to be made.

The trial court dismissed the complaint, and the teachers appealed. The teachers acknowledged that the legislature had the right to determine that a competitive test was no longer practicable, but they disputed its right to do so with respect to the whole supervisory service with one fell swoop. The court found authority for this distinction and held that the teachers had not sustained their burden to establish arbitrariness or unreasonableness.

The teachers also argued that they had a vested right to have the list employed as a ranked list until it expired or was exhausted. The court said that this argument overlooked the fact that the law was changed prior to the time that the list was promulgated. By the time their list had been established, the position had been reclassified out of the competitive class.

In the opinion of the court, the decision of the school board to convert the list from a competitive one to a qualifying one during the period of hiatus in legislative direction was not an unreasonable exercise of administrative discretion. The trial court decision was affirmed.

Heumann v. Board of Education of the City of New York
320 F.Supp. 623
United States District Court, S.D. New York,
December 7, 1970.

In February 1970, a physically handicapped teacher applied for and was denied a license to teach in the New York City schools. The reason given by the board of examiners was that since the teacher was confined to a wheelchair, she was physically and medically unsuited for teaching. The teacher notified the board that she wished to appeal this decision, and the administrative process was begun. While the appeal was still pending, the teacher brought this suit under the federal civil rights act, claiming violations of the due process and equal protection clauses of the Fourteenth Amendment and seeking declaratory and injunctive relief and damages in the event she did not obtain a position for the 1970-71 school year.

The court denied the teacher's motion for a preliminary injunction on the ground that the administrative appeal was pending. Subsequently, the board of examiners reversed its previous decision and granted the teacher a license, and then moved to dismiss the suit. As of September 1970, and at the time of the court hearing, the teacher was employed in the New York City school system.

The court ruled that by virtue of receiving the teaching license and being employed the teacher had been granted the essential relief she sought and, therefore, lacked standing to challenge the alleged constitutional inadequacies of the procedures and standards by which her application was judged. The court also ruled that the teacher's claim for damages did not affect the essential mootness of the action. Aside from the fact that a claim for damages, standing alone, will not support a civil rights action, the teacher did not specifically claim damages for the period during which her appeal was pending, but rather appeared to make her claim contingent upon her inability to obtain a teaching post for September 1970. The motion of the board to dismiss the action for lack of jurisdiction over the subject matter was granted.

Parents Association of Public School 222 K v. Community School Board of Local School District
319 N.Y.S.2d 864
Supreme Court of New York, Special Term,
Kings County, Part I, March 26, 1971.

The parents association of School 222 K sought an order that would direct the community school board to remove an acting principal, compel the board to enter into "meaningful consultation" with the association for the purpose of selecting an acting principal, and grant to the association a reasonable right to reject candidates for the position of acting principal.

It appeared that the board had appointed an acting principal for one semester over the objections of the parents association of the school. The parents association contended that the decentralization law applicable to New York City did not permit appointments by the community school board without prior consultation with the parents association. The community board maintained that it was not required to share with the association its power to appoint and assign employees within the local school district.

The court found that the decentralization law required each community school board to adopt a bylaw for the recognition of the parents association, and, except for granting the association the

right to have "full factual information pertaining to matters of pupil achievement," the legislature did not give parents associations any other status or rights. Therefore, the manner in which the acting principal was chosen was not in violation of the statute. Although cognizant that the community board in this case had a bylaw by which it undertook to have consultation with the parents association prior to the selection, appointment, and assignment of principals and assistant principals, the court ruled that the appointment of an acting principal for a limited or temporary period did not violate this bylaw.

The court also held that the parents association had not exhausted its administrative remedies nor asserted that the remedies were inadequate. An appeal could have been taken to the Chancellor of the New York City Board of Education and then to that board. In addition, a further appeal could have been taken to the state commissioner of education. Since the association had not availed itself of any of its procedural remedies, nor offered to show that they were inadequate, its judicial action was premature. In view of this determination the court did not reach the question of whether the community board had engaged in good-faith consultation with the parents association in conformity with its own bylaw, nor did the court consider the association's assertion that it had a reasonable right to reject candidates for the post of acting principal. The petition of the parents was dismissed.

SALARIES

Arkansas

Arkansas Education Association v. Board of Education of Portland, Arkansas School District
446 F.2d 763
United States Court of Appeals, Eighth Circuit,
July 26, 1971.

The Arkansas Teachers Association (ATA) originally brought a class action in 1968 against the school board to enjoin it from paying different salaries to black teachers than were paid to white teachers. Intervention was permitted by a black teacher who claimed to be a member of the class. Prior to trial the school board integrated the school system and began paying all of its teachers at the same rate. Thus, the only real issue at trial was the back pay for the black teachers employed by the school district in 1966-67 and 1967-68.

The trial court dismissed the suit and the Arkansas Education Association (AEA) as successor to ATA appealed. The AEA claimed that the trial court erred in dismissing ATA as a proper party to bring the suit, in holding that the disparities between the salaries of black and the salaries of white teachers were not a constitutional violation, and in holding that the plaintiffs were not entitled to attorney fees. The school board cross-appealed, charging error in the trial court finding that the persons seeking relief were of a sufficient number to warrant a class action; that ATA had legal standing to bring suit; and that the intervening teacher was a proper person to represent the class.

The appellate court held that the 17 affected teachers were a sufficient number to permit a class action and that both AEA and the intervening teacher were proper parties to bring suit. Further, the class action should not have been dismissed merely because a subsequent change in the school-board salary policy eliminated the need for injunctive relief, leaving only the question of damages.

On the substantive issue, the evidence established that in 1967-68 no black elementary-school teacher earned more than $4,500, while no white elementary-school teacher was paid less than $5,000. For secondary teachers, the highest paid black teacher earned $4,800 and the lowest paid white teacher earned $5,300. Similar discrepancies existed for 1966-67. The appellate court said these figures led to the conclusion that for the years in question the school district "systematically and without exception paid black teachers substantially less than they paid white teachers." The court held that this was constitutionally impermissible, and, therefore, the black teachers who were discriminated against were entitled to recover the difference between what they were paid and what they would have been paid if the school district had treated all teachers equally.

The judgment of the district court was reversed and the case remanded for a determination of the amount of damages and the question of attorney fees.

Florida

Board of Public Instruction of Dixie County v. Locke
243 So.2d 6
District Court of Appeal of Florida, First District, December 29, 1970.

(See page 33.)

Illinois

Hardway v. Board of Education of Lawrenceville Township High School, District No. 71
274 N.E.2d 213
Appellate Court of Illinois, Fifth District,
September 16, 1971.

The board of education appealed from the trial court decision which awarded certain teachers back salary. In 1967, the state minimum salary law had been amended to provide for higher minimum salaries and to add a section providing for higher salaries based upon "experience in a school district." The state superintendent interpreted this to mean previous experience in the school district currently employing the teacher. Accordingly, the Lawrenceville school district adopted a revised salary schedule that granted increased salaries recognizing only experience in that district. Eight teachers brought

suit seeking full credit for their previous teaching experience outside the district.

The trial court held that when a statute is subject to two or more interpretations, it should be given the meaning intended by the legislature. Since in August 1968, the statute was amended by deleting the words "based upon experience in a school district" and replacing them with the words "based upon previous public school experience," the trial court viewed this as a clarification of the legislature's original intention. On appeal, the school board contended that the 1968 change was a major revision in policy and not a clarification of the language, and, therefore, its 1967 salary schedule was correct.

The appellate court agreed with the decision of the trial court that the 1968 change was a clarification, especially in view of the fact that the effective date of the provisions, July 1, 1968, was not changed. The judgment of the trial court in favor of the teachers was affirmed.

Massachusetts

Fitchburg Teachers Association v. School Committee of Fitchburg
271 N.E.2d 646
Supreme Judicial Court of Massachusetts, Worcester, June 30, 1971.

The teachers association sought payment of salary adjustments to certain teachers due them under an amendment to the negotiated contract between the parties. The trial court denied relief and the association appealed.

The parties had a three-year negotiated agreement which was subject to annual re-opening on matters of compensation and working conditions. An amendment to the contract made in October 1968 was at issue here. Under this amendment which became effective January 1, 1969, the school committee agreed to pay "salary adjustment for a teacher's final year of service before retirement" based on the number of days over 170 served in each year of service. In June 1969, the school committee submitted to the city auditor an order for payment of sums due under the amendment to teachers retiring in 1969. Payment was refused on the ground that it would be improper. The trial court had ruled that the amendment was valid and proper, but dismissed the claim on the ground that the city had never appropriated any money to make the payments.

The appellate court said that on the assumption of a sufficiency of funds, there was no error in the trial court holding that the amendment was valid. The court held that the amendment providing for the salary adjustment was a valid exercise of the school committee's power to set wages and conditions of employment through the process of collective bargaining. In addition, the provision was reasonable since days in excess of 170 represented unused sick and personal leave, and would be limited to 10 days a year. Thus, the provision had the effect of rewarding lengthy and continuing service by teachers and discouraging frivolous use of such leave.

With regard to the funding, the appellate court did not find it necessary that there be a specific appropriation for this payment. The lack of such an allocation, the court said, would have no bearing on the committee's power to order the amount due paid so long as the payment did not cause the committee to exceed its total appropriation. The opinion of the trial court was reversed and the matter remanded to determine whether there were at the end of June 1969 sufficient unexpended funds in the total school appropriation for 1969 to make the payments required by the amendment to the contract.

Mississippi

United States v. Tunica County School District
323 F.Supp. 1019
United States District Court, N.D. Mississippi, Delta Division, July 16, 1970.

(See page 90.)

New York

Board of Education of Central School District No. 2, Town of Oyster Bay v. Nyquist
319 N.Y.S.2d 661
Supreme Court of New York, Appellate Division, Third Department, April 5, 1971.

(See *Teacher's Day in Court: Review of 1969*, p. 16.)

The board of education appealed from the decision of the trial court upholding a decision of the commissioner of education that a nurse-teacher was entitled to back pay for six years. The teacher had been paid for 15 years according to a salary schedule for nurse-teachers. The amount she received was above the statutory minimum but substantially less than the district paid classroom teachers. From time to time, the teacher had asked the board to classify nurse-teachers as teachers and to pay them accordingly. A few months prior to her retirement the teacher appealed to the com-

missioner, seeking back pay for the 15 years. Finding no reasonable basis for the difference in classification, the commissioner ordered back pay for six years.

The appellate court said that unless the decision of the commissioner on an educational matter is arbitrary or unreasonable, it will not be disturbed by the courts. The court ruled that the question of whether the local school board acted unreasonably in placing a certified teacher in a nonteaching classification was a policy matter in which the commissioner could substitute his judgment for that of the local board. Therefore, there was no basis for the court to disturb the determination of the commissioner that there should be no salary distinction between nurse-teachers and regular teachers. However, with regard to directing the payment of the back salary, the appellate court found that the commissioner had exceeded his authority. The appellate court could not see where the teacher had any legal right to back salary at the time she commenced her action. Since the commissioner had not yet filed an answer in this action, however, the holding was limited to the petition as existing at the time of appeal.

The judgment of the lower court was reversed and the case remanded to the lower court for further proceedings.

Board of Education of Union Free School District No. 3 v. Nyquist
317 N.Y.S.2d 212
Supreme Court of New York, Special Term, Albany County, December 21, 1970.

The board of education of Union Free School District No. 3 of Hempstead brought an action against the state commissioner of education, seeking to annul his determination that teachers were part of a summer school program and had to be paid in accord with the summer school salary schedule, and that the local board could not avoid this rule by having made a collateral contract with the teachers.

The court held that the proceedings before the commissioner involved an educational administrative policy in which the commissioner had the prerogative to substitute his judgment for that of the local board. The petition of the school board was dismissed.

Board of Education, Union Free School District No. 18 v. Boken
316 N.Y.S.2d 286
Supreme Court of New York, Special Term, Nassau County, Part I, December 9, 1970.

The board of education brought suit against a former teacher to recover the amount of salary paid to her while on sabbatical leave. The teacher had not returned to the school district following completion of the leave as she had agreed to do.

The teacher had been granted leave for the 1967-68 school year during which time she was paid one-half her regular salary. Prior to the end of the leave she requested an additional year without pay to complete her studies; this was granted. At that time the school district reminded the teacher that she must return to the school district for at least two years beginning September 1969. In April 1969, the teacher sent a letter of resignation. She was again informed that she was not free to resign unless she was prepared to pay back the amount that she had been paid while on leave.

The teacher argued that she had not signed any agreement to return to the district. She further argued that the moneys paid her during sabbatical leave were in fact additional compensation for seven years of prior service to the district. It was the opinion of the court that there was no valid defense to the school board's suit in view of the board rules adopted pursuant to statute which made the return to the district a condition of the payment of salary during a sabbatical leave. Acceptance of the salary by the teacher while on leave was acceptance of the condition imposed. The court held that since the teacher did not return to the district, she must refund the money. Further, her offer to return to the district after this action was commenced was not sufficient compliance with the rules.

Goldin v. Board of Education of the City of New York
324 N.Y.S.2d 823
Supreme Court of New York, Special Term, Kings County, Part I, September 27, 1971.

A regularly licensed teacher of common branch subjects appealed from the school board's denial of her application for a second salary differential. She claimed that she was entitled to the increased salary by virtue of a normal school degree and 45 hours of additional credit as provided for in the negotiated contract. The school board contended that the section of the contract applicable to the teacher required 60 hours of credit beyond the degree, not the 45 that she asserted was necessary.

It appeared that this issue had previously been arbitrated by the board and the teachers union; this resulted in the sustaining of the board's position. A clause in the contract between the parties

stated that the board would apply to all substantially similar situations the decision of an arbitrator sustaining a grievance and that the union would not bring or continue or represent an employee in any grievance substantially similar to a grievance denied by the decision of an arbitrator.

The teacher, a member of the teachers union, claimed that she was not bound by the arbitrator's decision of 1964, and that such decision was not confirmed by the court within one year of its delivery and could not now be confirmed or enforced and now had no legal effect.

The court ruled that the interpretation given the contract by the board was binding and in accord with the provisions contained in the contract. Furthermore, since the teacher sought the benefits of the contract, she was likewise bound by all its terms which inure to her benefit as well as to the benefit of all the members of the teachers union. The court found the action of the board was proper and dismissed the petition of the teacher.

Schwartz v. North Salem Board of Education
318 N.Y.S.2d 774
Supreme Court of New York, Westchester County, January 18, 1971.

(See page 108.)

Sife v. Board of Education of the City of New York
317 N.Y.S.2d 557
Supreme Court of New York, Special Term, Kings County, Part I, November 17, 1970.

(See page 45.)

Walsh v. Nyquist
325 N.Y.S.2d 103
Supreme Court of New York, Appellate Division, Third Department, October 21, 1971.

(See page 46.)

Wilson v. Board of Education, Union Free School District No. 23, Town of Oyster Bay
319 N.Y.S.2d 721
Supreme Court of New York, Special Term, Nassau County, Part I, December 10, 1970.

(See page 109.)

CONTRACTS

Arkansas

Corbin v. Special School District of Fort Smith
465 S.W.2d 342
Supreme Court of Arkansas, April 5, 1971.

In January 1970, the Fort Smith board of directors adopted a resolution stating that the spouses of the superintendent, assistant superintendent, and the director of finance and business affairs would not be employed by the school district in any capacity. As a result of this resolution the wife of the superintendent was advised that she would not be re-employed as a teacher for the 1970-71 school year. The teacher brought suit contending that the regulation was void and that she was still employed by the school district. She sought a judgment for salary allegedly due her and for reinstatement. The trial court denied relief and the teacher appealed.

The first question on appeal concerned the state administrative procedures act. The teacher alleged that the resolution was not adopted in accordance with this legislation. The parties agreed that the act applied only to state agencies but differed as to whether a school district was a state agency. The court held that a school district was a political subdivision and not a state agency within the meaning of the act.

The next contention on appeal was that the school-board resolution was attempting to set the qualifications of teachers and that the legislature had not delegated this power to school districts. The court disagreed with the teacher's interpretation of the resolution, noting that it had nothing to do with the teacher's qualifications. Rather, it involved the district board's discretion in the employment of teachers as authorized by law. Having concluded that the board had the authority to adopt the resolution, the court then considered whether the resolution was arbitrary or unreasonable. The court could not say from the record that the resolution was arbitrary or unreasonable for there was no evidence from the record that the board abused its discretion. The court held that the trial court was correct in not interfering with that discretion.

The teacher's final point was that a school board may not dismiss a teacher arbitrarily. The court reviewed the continuing contract law and found that the teacher had been notified in accordance with that law that her contract would not be renewed. The court was of the opinion that the rights of the teacher were governed by her contract and by the continuing contract law and not on "an expectancy of continued employment" while her husband was superintendent of the school district. The judgment of the trial court was affirmed.

Hampton School District No. 1 of Calhoun County v. Phillips
470 S.W.2d 934
Supreme Court of Arkansas, October 4, 1971.

A discharged superintendent brought suit against the school district, claiming that his discharge was in violation of his contract. Suit was brought in equity to obtain a reformation of the contract on grounds of mutual mistake and to recover damages for wrongful discharge. The court ruled in favor of the former superintendent, and the school district appealed, charging lack of jurisdiction of equity court and that, in any event, the superintendent was not entitled to damages.

It appeared that it was the practice of the parties to execute two-year contracts effective July 1. Toward the end of the first year of the contract the parties always made a new two-year contract, usually containing a raise in salary. Consequently, each new two-year contract superseded the second half of the previous contract. On July 1, 1969, the parties executed a new contract containing a salary raise. However, by mistake the superintendent's secretary used a one-year form in making out the contract rather than the two-year form the parties intended to use; also, she failed to include a provision concerning the house furnished the superintendent by the school district. In February 1970, the superintendent noticed the mistakes in the contract and attempted to execute a corrected contract to file with the county treasurer. This attempt was abortive, however, since he used the facsimile signature of a school-board president who went out of office before the corrected agreement was filed with the county treasurer. In April 1970, the school board took the position that the con-

tract was effective for only one year and, therefore, the superintendent's employment would be terminated on June 30, 1970. Suit was then brought.

The appellate court found no merit in the school district's contention that equity court did not have jurisdiction, saying that reformation of written instruments for mutual mistake is a matter within the exclusive jurisdiction of equity. The second argument of the school district, that the superintendent had only a one-year contract, was also rejected by the appellate court. The evidence clearly showed that it was the practice of the parties to issue two-year contracts and there was no proof that the school board meant to change its practice. The superintendent and his secretary testified, without contradiction, that the one-year limitation was a mistake on the part of the secretary. That the secretary or even the superintendent himself acted for the school district in affixing the facsimile signatures did not mean that it was impossible for both parties to be mistaken in so signing an agreement that did not express their true intent.

The appellate court held that the trial court was correct in reforming the contract. Since a reformed contract is retroactive, the superintendent had a valid contract at his discharge and was entitled to recover damages. The appellate court held, however, that the superintendent was not entitled to recover for loss of travel expenses for the year that he was not employed by the board since he did not travel for the district during that time.

Mitchell v. Alma School District No. 30
332 F.Supp. 473
United States District Court, W.D. Arkansas, Fort Smith Division, October 4, 1971.

An elementary-school teacher brought a civil rights action against the school district, charging that his contract was not renewed because of his efforts to form a classroom teachers association. The school board alleged that the reason for nonrenewal was "his persistent failure to observe announced administrative policies regarding discipline of students."

The teacher's version of the facts was that the school system employees voted under a change in the Arkansas Education Association constitution to become a part of the all-inclusive county-wide unit with provision for a separate classroom teachers organization. He alleged that he was not rehired because of his activities in attempting to form this separate organization to which the superintendent was opposed.

The school-board version was that although the teacher had been employed by the system for 10 years and was considered a good and effective teacher, he was unable to follow directives concerning the administering of corporal punishment to students. The board alleged that the teacher was aware of its announced policy that the child should be counseled first, and that if paddling was necessary, it should not be administered without an adult witness present. In spite of these announcements the school officials continued to get complaints that the teacher administered paddling out side the presence of adult witnesses.

The court noted that while the teacher testified to virtual ignorance of this policy, he had acknowledged to his principal that he heard it announced at a faculty meeting and that he turned in reports as required showing when corporal punishment was administered, and some of these reports indicated the presence of adult witnesses. The court found that the teacher had a clear knowledge of the policy. The court also found conclusive evidence that the teacher had appeared before the board at a meeting in which it was to consider the recommendations of the superintendent that the teacher's contract not be renewed, that all discussion at that meeting related to his problems of classroom discipline, and that his activities in the teachers association were never mentioned. The court concluded that the teacher had failed to show that his contract was not renewed because of his association activities. Further, the board considered only the teacher's failure to follow the announced discipline policy in its decision not to renew his contract. Finding no abuse of discretion on the part of the school board, the court dismissed the petition of the teacher.

California

Lucas v. Board of Trustees of Armijo Joint High School District
96 Cal.Rptr. 431
Court of Appeal of California, First District, Division 3, July 28, 1971.

The former superintendent of a high school district brought suit to compel his reinstatement. The trial court denied relief, and the superintendent appealed.

The superintendent had been employed for a four-year term beginning July 1, 1963. State law provides that a superintendent is automatically reemployed for a term of similar length unless notified in writing to the contrary at least six months prior to the end of his term. During its regular meeting on September 19, 1966, the board

went into executive session and voted not to re-employ the superintendent. The superintendent was informed of this action and asked whether he wanted it made a matter of public record. He replied that he wished the matter to remain private until he consulted his attorney. At the regular November meeting, the board reconsidered its action, again in executive session, and voted once more not to re-employ the superintendent. Again the superintendent requested that public notice be withheld until he consulted his attorney. In December 1966, the superintendent was given written notice that he would not be rehired, and in March 1967, the board amended its formal minutes of the September and November meetings to show that the superintendent was not being rehired.

The court found substantial evidence to support the finding that the board had voted in September not to rehire the superintendent. The court also found no merit in the superintendent's contention that the September and November actions were invalid because they occurred in executive session rather than in an open meeting. State law permits the board to consider personnel matters in executive session, and this, the court ruled, includes acting on such matters in executive session. Likewise rejected by the court was the contention that the termination should have been included on a published agenda. The court felt that this would negate the purpose of the statute permitting personnel matters to be considered in executive session.

The final finding of the appellate court was that the superintendent was estopped from arguing that the amended minutes were invalid for these reasons. The superintendent was secretary of the board and charged with taking the minutes or causing them to be taken. He was informed that renewal of his contract would be considered, yet he did not ask anyone else to keep the minutes. Moreover, he was informed of what action the board had taken at the end of the executive session, yet he did not indicate this action in the formal minutes and in fact requested that the matter not be made public.

The judgment of the trial court was affirmed.

Idaho

Heine v. School District No. 271
481 P.2d 316
Supreme Court of Idaho, February 24, 1971.

A teacher appealed from the trial court judgment dismissing his claim of damages for wrongful discharge on grounds of insufficient evidence. The teacher alleged (a) that he was wrongfully discharged by the school district in 1963, (b) that the state department of public instruction wrongfully refused to certify him as an elementary-school teacher, and (c) that all of the defendants conspired against him and defrauded him of his right to be employed. Besides the school district the defendants included the state of Idaho and the state superintendent of public instruction, the local and state education associations, and the National Education Association.

The trial court dismissed the case against the state, the state board of education, and the state superintendent since service was never effectively completed upon them. Upon the conclusion of the teacher's case, the complaint was dismissed as to the three education associations. The second claim of the teacher was dismissed on the ground that the state board of education was the only administrative board authorized to issue a certificate, that it was not a party to the lawsuit, and thus the claim could not be decided. The third claim, that of the conspiracy to prevent the teacher's employment, was dismissed for a lack of evidence.

With regard to the first claim, that of wrongful discharge, the trial court had found that the teacher's employment was conditioned on three things: taking additional history courses, registering a valid certificate with the local school board, and signing a written contract to teach. Finding that only the first requirement had been complied with, the trial court upheld the discharge.

On appeal the teacher claimed that the findings of the trial court were not supported by substantial evidence. From the evidence in the record the appellate court found that the teacher was offered a teaching position, but that he never signed the written contract and never presented a valid certificate. However, he did teach from September 1963 until Christmas vacation, after which he failed to return to his duties. On review of the record, the appellate court concluded that there was substantial support for the findings of the trial court that there was no evidence to support the conspiracy theory and that service had never been properly made on the state defendants. Accordingly, the decision of the trial court against the teacher was affirmed.

Iowa

McGuffin v. Willow Community School District
182 N.W.2d 165
Supreme Court of Iowa, December 15, 1970.

(See page 35.)

Kansas

Endicott v. Van Petten
330 F.Supp. 878
United States District Court, D. Kansas,
August 12, 1971.

(See page 64.)

Missouri

Williams v. Longtown School District No. 71 of Perry County
468 S.W.2d 673
St. Louis Court of Appeals, Missouri,
May 25, 1971.

An elementary-school teacher appealed from the trial court decision in favor of the board of education on her breach of contract suit. The teacher had been employed for the 1967-68 school year to teach grades 5 through 8. On December 11, 1967, the three members of the school board accompanied by the superintendent met her after school. What happened was in sharp dispute, but the next day a substitute teacher was in the classroom. For the next four days the teacher returned to school prepared to teach, but the substitute teacher was always there. There were no minutes of the December 11 meeting of the board, but the minutes of the December 21 meeting stated that it was decided to dismiss the teacher because she was unable to perform her obligations as a teacher.

The following day a letter was sent to the teacher, accepting her oral resignation. On December 28, the teacher, through her attorney, denied that she had resigned. The return letter from the board of education again referred to the teacher's oral resignation, stating that the teacher had said, "If you are going to withhold my pay, I quit right now. Get yourself another teacher." The case was tried on the question of whether the teacher resigned or was fired.

Testimony at the trial indicated that the teacher was not permitted to teach after December 11, and referred to the minutes stating that she was dismissed. The only evidence which purported to show that the teacher resigned were the letters from the school board to the teacher.

Under state law the board of education could have withheld the teacher's salary only after written notice to the teacher. No such notice was given to the teacher. Thus, the members of the board had no right to threaten to withhold the teacher's salary. And even if the teacher did say that she would quit, the appellate court said, under the circumstances this statement did not amount to a resignation.

The court concluded that the overwhelming weight of the evidence demonstrated that the board dismissed the teacher in clear violation of state law. The decision of the trial court was reversed with directions that the teacher be awarded the damages caused by the board's breach of her contract.

Oregon

George v. School District No. 8R of Umatilla County
490 P.2d 1009
Court of Appeals of Oregon, Department 2,
November 11, 1971.

The school district appealed from the trial court decision, holding that a teacher's contract had been breached and that the teacher was entitled to reinstatement and damages. The teacher, employed by the system since 1962, had been given a three-year contract ending in 1971 at a salary of $11,300. Broken down, this consisted of a base salary of $9,300 and $2,000 for coaching. After two unsuccessful seasons, during which the football team won only two games, the teacher was relieved of his position as coach. At first nothing was said about whether this action would affect his salary, but when the notification for the 1969-70 salary was sent out in the spring, it did not include the $2,000. At this point two years of the teacher's three-year contract remained. The teacher modified the notification form by inserting the $2,000, and the school district then refused to accept it, treating it as a refusal to teach and declared the position vacant. Suit was then brought.

The teacher asserted that the contract was indivisible at an annual salary of $11,300. While he agreed that the school district could relieve him of his coaching duties, he insisted that the board could not, by changing his duties, lower his salary during the contract term. The board argued that the contract was divisible, one a three-year contract to teach, the other, a one-year contract to coach football. The appellate court looked at the custom and usage in the school district and at other cases that had arisen, and concluded that the trial court was correct in upholding the teacher. There was nothing in the contract to suggest that the parties intended that the teacher not have a single three-year contract covering teaching and coaching. The testimony also failed to establish that it was customary for the school board to change extra-duty assignments during a contract

term without the consent of the teacher when such change resulted in a lower salary. Since the appellate court held the contract indivisible, it followed that the school board had breached the contract by reducing the teacher's salary.

With this conclusion, the question then became what damages were proper. The trial court had ordered the teacher reinstated for the balance of the contract term and ordered the school district to pay damages for the one year that he was not employed by the district. In first considering the reinstatement issue, the appellate court noted that two statutes applied, depending on the size of the district. In large districts the fair dismissal law was applicable. In districts the size of the one here, the teacher was entitled to a three-year contract at the end of the probationary period during which he could not be dismissed except for statutory cause. Reinstatement was specifically mentioned as the remedy for a wrongfully discharged teacher in a fair dismissal district, but the statute applicable in this instance provided that for a breach of contract the teacher had his "ordinary legal remedies." From this the appellate court concluded that reinstatement was not available in this instance. Instead the teacher would be entitled to monetary damages.

The final problem concerned the amount of damages awarded by the trial court. During the 1969-70 school year the teacher served as a substitute teacher in another school district. That district had offered him a contract at a salary of $13,000 which he had refused to accept. His reasons for refusing were that since he was suing for reinstatement, he was of the opinion that he must remain available to perform his contract with the defendant district. The board conceded this as a justifiable reason for rejecting the offer, for this would have been a waiver of the teacher's demand for reinstatement, but argued that if the teacher was not entitled to reinstatement, the damages should be related to what he could have earned under that offer. Although the appellate court ultimately held that the teacher was not entitled to reinstatement, it said that the issue of reinstatement was a close and difficult one. Therefore, the appellate court could not say that the course of action chosen by the teacher was unreasonable. Accordingly, he would be entitled to the difference between what he would have earned had he not been discharged and what he did earn as a substitute.

The portions of the trial court decision holding that the school district had breached the teacher's contract and ordering money damages were affirmed. That portion directing reinstatement was reversed.

Texas

Cummins v. Board of Trustees of the Eanes Independent School District
468 S.W.2d 913
Court of Civil Appeals of Texas, Austin,
June 9, 1971.

A high-school English teacher sued the school district for specific performance of her contract or for damages for breach of contract or deprivation of constitutional rights. At the trial the school district argued that the teacher had not exhausted her administrative remedies of appeal to the state education authorities. The trial court agreed and upheld the school district. The teacher appealed.

The teacher's contract contained a clause specifying that notice of nonrenewal for the 1970-71 school year would be furnished by April 1, 1970, and if notice was not given by that date, the school board should be deemed to have elected to employ the teacher for the next school year. Despite this language, the school board voted on April 30, 1970, not to renew the contract and notified the teacher of this action on May 4, 1970. The contract also provided that upon written request the teacher would be entitled to a hearing at which the reasons for the action would be given. The teacher requested a hearing which was held on June 15. At the hearing the school board refused to go into the question of whether notice of nonrenewal had been timely, and limited the hearing to its reasons for the action. Following the hearing, the board voted to reaffirm its previous action not to renew the contract.

At issue before the appellate court was whether the teacher was entitled to bring this action without exhausting her administrative appeal remedies. The appellate court observed that the contract was substantially identical to the statute pertaining to probationary contracts. While the statute is not mandatory and must be adopted by each individual school district, the court found no evidence that the school district had not adopted the code. Having chosen to employ the teacher under a probationary contract which faithfully tracks the terms of the statute, the school board was bound thereby. The appellate court concluded that the school board had not complied with the terms of the contract that were clear and unambiguous, and, therefore, there was no issue of fact involved and no requirement of exhausting administrative remedies if any were available to the teacher. The court construed the provision in the statute that the board decision is final and nonappealable as prohibiting only appeals to state

administrative authorities and, as not denying independent suits for breach of contract or deprivation of constitutional rights. Otherwise, the provision would be unconstitutional, and the same could be said for similar provisions in the contract, for without recourse to the courts, the teacher would be without a remedy.

Having concluded that the case should be reversed and remanded for a trial on the merits, the court commented on the school-board claim of sovereign immunity. That immunity, the court said, applied to actions in tort. This was a contract action, and, therefore, the school board could be sued.

TENURE

Tenure Teachers

THE CASES comprising this section fall into two categories, those in which the teacher has tenure, and those in which the presence or absence of tenure is at issue.

Alabama

Mills v. Birmingham Board of education
449 F.2d 902
United States Court of Appeals, Fifth Circuit, September 17, 1971; rehearing and rehearing En Banc denied, November 8, 1971.

(See page 83.)

Arkansas

Downs v. Conway School District
328 F.Supp 338
United States District Court, E.D. Arkansas, June 23, 1971.

A discharged elementary-school teacher sued the school district, alleging that her constitutional rights had been violated and seeking declaratory and injunctive relief and damages.

The court found as fact that the teacher had over 25 years' experience in Arkansas public schools and had been employed by this school system since December 1966. During the 1967-68 school year, a water fountain in the teacher's second-grade class broke. Some weeks later when it had still not been repaired at a time when the temporary water supply (a plastic bucket with cups) she had provided was exhausted and needed refilling, the teacher, during art class asked her pupils to draw pictures of the other pupils and express in the picture how each one felt. Some of the pupils drew pictures of other pupils lying down asking for water and of wilted flowers. The teacher showed some of these drawings to the principal but did not disseminate them further. Some pictures did come into the hands of the superintendent of maintenance, but the superintendent of schools was not aware of them until October 1969.

During the entire period of the teacher's employment in the district there was an open incinerator in the school yard. The teacher had complained to the principal numerous times about the smoke and ashes that were seeping into her classroom and causing physical discomfort to her and the children in her class. Complaints were also made to the superintendent, and the teacher and her husband offered to pay the cost of trash removal; this was declined by the superintendent. The incinerator also constituted an attractive nuisance to the children, and overflowing debris was a hazard on the playground. Unknown to the teacher, mothers of pupils also complained to the superintendent. In April 1970, the teacher again complained about the incinerator and was told by the superintendent that she was the only teacher to complain. Feeling that she may have been wrong in her protests, the teacher wrote notes to the other teachers in the school, asking whether the incinerator was objectionable to them. One teacher did not reply and when reminded once or twice, complained to the superintendent about this teacher.

As to the other facts in the case, in January 1970, during class instruction on the nutritional value of foods, after noting that raw carrots were more nutritious than cooked carrots, one pupil asked if she might write a letter to the superintendent of the school lunch program, asking that raw carrots be served at times instead of cooked carrots. Since the children's workbook instructed them in writing this type of letter and because it was the child's own idea, the teacher allowed the letter to be written and signed it at the request of the pupils. When the matter came to the attention of the superintendent, he charged the teacher with going over his head and violating school policies,

and for the first time told the teacher that he knew of the drawings made when the water cooler was broken. The teacher told him that she had no intention of going over his head and that she did not feel that she had violated school policies.

Although the teacher's principal had recommended her for contract renewal, her contract was not renewed. The reasons given were (a) insubordination, (b) lack of cooperation with the administration, and (c) teaching second-graders to protest. The court found no evidence to support any of the charges and found as fact that the superintendent demanded blind obedience to any directive, whether illegal, unconstitutional, arbitrary, or capricious, and that he gave and interpreted school policies in such a manner as to deny teachers and pupils their constitutional rights. The court noted that there was a school policy barring the circulation of petitions without the approval of the superintendent. The intention of this policy was to prevent classroom disruption. This policy was interpreted by the superintendent to mean all correspondence, petitions, and requests unless they had his blessing prior to circulation. The court said that this amounted to total censorship. The superintendent had determined that the teacher violated this policy by allowing the letter requesting raw carrots to be written and showing the children's cartoons to the principal. The court found both these activities to be completely reasonable and in keeping with the prescribed curriculum.

The third charge against the teacher, writing to the other teachers concerning the incinerator, was the principal complaint of the superintendent. The court found that it was the position of the superintendent that the teacher could either live with the incinerator or resign. Either alternative, the court said, would violate the teacher's moral, if not legal, duty to protect the health and welfare of her pupils. In her effort to have the hazard eliminated, the teacher at all times worked through channels in accordance with school policy. The court said that when "a School Board acts, as it did here, to punish a teacher who seeks to protect the health and safety of herself and her pupils, the resulting intimidation can only cause a severe chilling, if not freezing, effect on the free discussion of more controversial subjects."

The court found it unnecessary to discuss whether the teacher had been given sufficient procedural due process in light of its holding that substantively the action taken by the school district was unconstitutional. The court ordered the teacher reinstated to her position and compensated for her lost wages for the 1970-71 school year, as well as full court costs and attorney's fees.

California

Blodgett v. Board of Trustees, Tamalpais Union High School District
97 Cal.Rptr. 406
Court of Appeal of California, First District, Division 2, September 22, 1971.

A high-school physical education teacher sought a writ of mandate directing the school district to re-employ her. The lower court denied the writ and the teacher appealed. The parties agreed that the sole reason for the nonrenewal of her contract was the recommendation of the principal that her overweight condition rendered her unfit for service.

The teacher had served as a substitute in the district prior to being appointed to a full-time position for the 1966-67 school year. The school principal and the department chairman had taken her weight into consideration when recommending her appointment. The teacher was evaluated twice during her initial year of employment and received highly favorable reports. No mention was made of her weight. Later the principal did discuss the matter with her, and she agreed to see a doctor. At the time she was notified that she would not be re-employed, she was under a doctor's care and was beginning to lose weight. The notification of nonrenewal stated that her physical condition rendered her unfit to instruct. Specifically it stated that the teacher was unable to serve as a model of health and vigor to the girls in her class and that she was restricted in her ability to perform or teach aspects of the physical education program. A hearing officer made findings to this effect which the board adopted. It was conceded that there is no requirement that physical education teachers be able to demonstrate any particular course, and it was also admitted that the teacher was able to control her classes. Much evidence was introduced, including testimony from parents of girls in her classes as to the teacher's effectiveness and rapport with her students. The teacher's doctor testified that with the aid of medication she was taking she would continue to be able to diet successfully.

The court noted that by statute discharge of the teacher could be for cause only and that the cause must relate solely to the welfare of the schools and the students. On a review of the evidence, the court said that while the teacher was overweight, it had not been shown that this significantly impaired her ability to demonstrate various sports. The court noted that the record was replete with testimony to the effect that physical education teachers need not excel at demonstration to perform their instructional duties competently and

well. There was evidence that student demonstrators are equally or more effective and that other teachers at the high school did little or no demonstrating.

As to the complaint relating to the teacher's image as a model of health and vigor and testimony that some of the students had laughed at the teacher because of her weight, the court said that the relevance of this as bearing on the teacher's effectiveness was never shown. The court also found it noteworthy that the teacher weighed less at the time she was told her contract would not be renewed than she did when the second favorable evaluation was made by the principal.

The instant case, the court said, involves a situation where a physical condition unrelated to fitness to teach was used as a pretext for refusing to rehire the teacher. In conclusion the court quoted from a New York case with similar facts, that "obesity, standing alone, is not reasonably and rationally related to the ability to teach or to maintain discipline." The judgment of the trial court was reversed and the writ directing the school district to re-employ the teacher was issued.

Board of Trustees of the Compton Junior College District v. Stubblefield
94 Cal.Rptr. 318
Court of Appeal of California, Second District, Division 2, April 20, 1971.

On March 4, 1969, a tenured junior-college teacher was suspended and notified of the board's intention to dismiss him after 30 days. The charge was immoral conduct and evident unfitness to teach. The teacher demanded a hearing, which the board held. Subsequently, pursuant to law the board filed a complaint in the superior court requesting that the court inquire into whether or not the charges made against the teacher were true, and if so, whether or not the charges constituted sufficient grounds for dismissal. The trial court found that the charges were true and that they constituted sufficient grounds for dismissal. The teacher appealed from this judgment.

The principal contention on appeal was that the charges did not constitute sufficient ground for dismissal. Although there was some conflict in the evidence, the trial court had found that a deputy sheriff had spotted the teacher's car parked on an unlighted side street, and thinking it abandoned, went to investigate. The teacher was in the car with a female student, both in a state of undress. After the deputy identified himself, the teacher shouted at the deputy, started the car, and accelerated rapidly, knocking the deputy down and causing him minor injuries. The teacher then drove away at a high speed. The deputy pursued the teacher at high rates of speed until the student persuaded the teacher to stop the car.

In considering whether the trial court's conclusion that the conduct of the teacher was sufficient grounds for dismissal, the appellate court said that at a minimum, responsible conduct on the part of a teacher, even at the college level, excludes meretricious relationships with his students and verbal and physical assaults on duly constituted authorities in front of his students. The teacher cited *Morrison v. State Board of Education,* contending that this case prohibited his discharge because the evidence against him concerned only his conduct and did not expressly show how that conduct rendered him unfit to teach. In *Morrison* the court had held that a teacher's certificate could not be revoked on the basis of a single noncriminal private act of a homosexual nature committed three years previously with a consenting adult, without a showing that he was unfit to teach. The teacher in the instant case argued that he had not been proven unfit to teach and, therefore, could not be dismissed under the doctrine enunciated in *Morrison.* The court disagreed, noting that the cases were distinguishable on their facts. The court found substantial differences between the cases in terms of lapse of time between the conduct and the discharge, the locales where the conduct occurred, and the status of the parties involved.

The appellate court said the clear import of *Morrison* was that a teacher may be discharged or have his certificate revoked on evidence that either his conduct indicates a potential for misconduct with a student or that his conduct has gained sufficient notoriety to impair his on-campus relationships. While in this case the court found no direct evidence of notoriety, the court did say that "the very fact that a police officer, in the course of his official duties, easily discovered [the teacher] and his companion, demonstrates the tenuous security from public attention provided by the front seat of [the teacher's] automobile." Finally, the court said, "unfitness to teach" in terms of an indication that the teacher was "more likely than the average adult male to engage in any untoward conduct with a student" could be inferred from the conduct itself.

The appellate court concluded that the findings of the trial court were amply supported by the evidence. Further, the appellate court made the specific finding that the conduct of the teacher constituted immoral conduct which indicated unfitness to teach. The judgment was affirmed.

Colorado

Draper v. School District No. 1, City and County of Denver
486 P.2d 1048
Supreme Court of Colorado, In Department, June 28, 1971.

An elementary-school principal who was reassigned as a classroom teacher at a lower salary brought suit against the school district to reinstate her as a principal with commensurate pay. Prior to the trial, the teacher sought to join additional defendants and to file an amended complaint. The trial court refused to allow this procedure and granted the motion of the school district for summary judgment. The teacher appealed.

The first argument on appeal was that it was error for the trial court not to allow the additional parties to be added, specifically the Denver Classroom Teacher's Association (DCTA) which the teacher alleged had played a large part in her demotion. The appellate court disagreed with the teacher's contention and noted that the case against the district involved only questions of law on interpretation of the teacher tenure law while the case against DCTA involved factual questions. As such, the joining of additional defendants was not necessary to a resolution of the case against the district and permission for joinder was within the discretion of the trial court.

The next argument of the teacher was that the tenure law had been violated since she was transferred without a hearing. The appellate court disagreed, since under the statute a hearing is necessary when tenure teachers are dismissed from their positions as *teachers*, and a school board may transfer a teacher to another position without a change in salary "except that a teacher who has been occupying a position of an executive or administrative nature, may, if deemed unsatisfactory in such a position be returned to regular classroom teaching at the regular salary figure to which he would have been entitled had he not occupied the administrative or executive position." The appellate court pointed out that the statute does not provide tenure in an administrative position, and that the teacher had tenure only as a teacher and not as a principal. Further, there was no statutory provision for notice and hearing when a teacher is returned from an administrative position to a teaching position. Therefore, the school district had the authority to transfer the teacher in this case without a hearing. The decision of the trial court in favor of the school district was affirmed.

School District No. Fifty of Adams County v. Witthaus
490 P.2d 315
Colorado Court of Appeals, Div. II, August 24, 1971; rehearing denied September 28, 1971.

The school district appealed from the decision of the trial court directing it to reinstate a high-school teacher who had been dismissed. Her principal had recommended the dismissal, and on March 28, 1967, the board decided to entertain the charges and sent a letter to the teacher informing her of this fact. As provided by statute, she requested a review panel to hold hearings on the charges. In May 1967, the hearing was held before a three-member panel which filed a report with the board recommending the teacher's dismissal. The board agreed with the report and terminated the teacher's employment. The teacher appealed to the district court. After a trial held in court in June 1969, the court ordered that the teacher be reinstated. This appeal by the school board followed.

Under state law, once the hearing panel is established, evidence proving the charges must be presented, and the teacher must be given an opportunity to rebut and offer evidence on her own behalf. At the conclusion of such hearing, the law provides that the panel "shall report its findings and conclusions to the members of the board or committee. The board or committee shall then make decision with regard to the recommendations of the panel." In this instance, although an extensive hearing was held before the panel, its report consisted of cursory remarks affirming dismissal by two of the three panel members. Based on these statements, the school board terminated the teacher's employment.

The appellate court held that it was not within the authority of the panel to terminate the teacher's employment. Rather, its sole function was to review the evidence presented, make findings and conclusions, and report the same to the board. The board is then to make an independent evaluation of the proper course of action to take, either concurring with or rejecting the panel's recommendations. In this instance, the court found it apparent from the record that no independent judgment by the school board was exercised. The cursory report of the panel, the court said, merely stated a conclusion that the employment should be terminated without setting forth facts, evidence, and findings used to reach that conclusion. Because the board had failed to comply with the proper procedural steps in terminating the teacher, the appellate court ruled that the board action was a nullity. Therefore, it affirmed the trial court decision and

directed that the teacher be reinstated as of the date of the attempted termination.

Florida

Beckwith v. Board of Public Instruction of Dade County
247 So.2d 508
District Court of Appeal of Florida, Third District, April 27, 1971; rehearing denied May 26, 1971.

A teacher brought a class action for a declaratory judgment on behalf of himself and of all other teachers who claimed similar rights, that he was entitled to a continuing contract for the 1967-68 school year. The trial court ruled that he was not entitled to a continuing contract and the teacher appealed.

Prior to July 1, 1967, state law required that for a teacher to be eligible for a continuing contract he must have graduated from a four-year college, completed a three-year probationary period, have been reappointed for the fourth year, and have received a passing score on the National Teachers Examination (NTE). The law was amended in 1967 to delete the NTE requirement. As of July 1, 1967, the teacher in this case had completed all of the requirements except the NTE score. He claimed that as of the effective date of the amendment, July 1, 1967, he was automatically entitled to a continuing contract. The board, however, claimed that to receive a continuing contract for the 1967-68 school year, all of the requirements had to be met by June 30, 1967, and since the examination was still required as of that date and the teacher had not passed it, he was not entitled to a continuing contract for 1967-68.

The question on appeal was whether the interpretation of the statute made by the administrative authority and adopted by the trial court was clearly erroneous. Sustaining the decision below, the appellate court held that the interpretation adopted was supported by the language in the statute. Therefore, the teacher was not entitled to a continuing contract for 1967-68. However, since as of July 1, 1967, the teacher had completed all of the requirements for continuing contract status, he was entitled to that contract as of July 1, 1968.

Board of Public Instruction of Dixie County v. Locke
243 So.2d 6
District Court of Appeal of Florida, First District, December 29, 1970.

The board of public instruction appealed from an adverse decision directing it to pay to a teacher salary for a portion of the 1968-69 school year. The teacher had taught in the school system from 1957-58 through the 1959-60 school year. He accepted a contract for the 1960-61 school year but limited to about January 7, 1961, when he was to assume the duties of the office of superintendent. On that contract the word *teacher* had been stricken out and elementary principal substituted. The trial court determined that there was no right to a continuing contract as principal but a continuing contract as a teacher did exist. In January 1969, when his successor took office as superintendent, the teacher sought to be re-employed by the school district. There were no principalship positions vacant, and the teacher vacancy was one for which the teacher was not certified. State law provides that service as superintendent shall be construed as continuous teaching service in the public schools.

The trial court held that the teacher had a valid continuing teacher contract and that the school board was in error in not employing him as a teacher even though in a position for which he was not certified, because the board had done so for other teachers when certified teachers were unavailable. The trial court held that under such circumstances the teacher was entitled to payment of his salary from January 7, 1969, to the end of the 1968-69 school year in accordance with his contract of continuing employment as a teacher, his certificate, and the district salary schedule. The appellate court agreed with the conclusions of the trial court and affirmed the opinion.

Evans v. Polk County School Board
249 So.2d 725
District Court of Appeal of Florida, Second District, July 2, 1971.

A teacher suspended on grounds of willful neglect of duty and incompetency sought a declaratory judgment that she was entitled to have the hearing officer rule on matters of law as to the charges against her. The trial court entered an adverse judgment and the teacher appealed.

The trial court had held that the teacher had been "informed with reasonable certainty of the nature and accusation against her and has had reasonable opportunity to defend against attempted proof of such charges, and there is no proof before this Court that would show that the proceedings to date before the defendant Board and before the Hearing Examiner have not been conducted in a fair and impartial manner, free from any suspicion of prejudice, unfairness, fraud or oppression."

The appellate court believed that the trial court committed no error in this ruling. Accordingly, the judgment was affirmed.

Ford v. Bay County School Board
246 So.2d 119
District Court of Appeal of Florida, First District, December 3, 1970.

A teacher sought review of the decision of the county board of education discharging her and the decision of the state board of education affirming the school-board action. The teacher had been employed in the district for about 19 years. On weekends she was accustomed to driving to another city to help her mother operate a liquor store which had been in the family for years. On September 30, 1967, agents of the state beverage department came into the store and claimed to have found a lottery ticket and various other gambling paraphernalia. The teacher was placed under arrest and charged with the possession of a lottery ticket.

On October 6, 1967, the county assistant superintendent of schools sent a letter to the teacher informing her that he had been notified by the beverage department of the charges against her and that she was suspended from her teaching position until such time as the school board could take action on her case. On October 11, 1967, the school board confirmed the teacher's suspension, pending the disposition of the charges against her. Ultimately on December 16, 1968, the criminal case against the teacher was dismissed for lack of evidence on the request of the beverage department.

On May 5, 1969, the teacher wrote to the school superintendent requesting a speedy hearing of the charges, if any, pending against her. The superintendent replied on June 4, 1971, stating the charges against her and setting the hearing for June 26, at which time she would be given an opportunity to present any evidence on the charges. At the hearing the teacher presented witnesses and testimony on her own behalf. However, on August 26, the board voted to sustain the charges on which the teacher was originally suspended and to dismiss the teacher. The state board of education affirmed this action.

On appeal, the teacher contended that she was denied due process of law by the failure of the board to serve written notice of the time and place of the hearing as required by statute and that the proceedings of the board at the hearing were not completely impartial since the school-board attorney also served as the prosecutor. With respect to the lack of notice the court noted that a hearing on a suspension is required only if the teacher so requests. In this case the teacher's request was made over a year and a half after her suspension and the board promptly replied with written notice of the charges and notice of the hearing. The board fully complied with the terms of the statute, the court said, and the teacher could not complain of her own lack of diligence in requesting a hearing.

Concerning the second contention of the teacher, that the attorney for the board acted as prosecutor, the court pointed out that he did not proffer legal advice during the hearing nor was he present when the board reached its final judgment. Nor did the teacher at the hearing raise any objection to the procedure. An examination of the record led the court to conclude that the proceedings were conducted in a fair and impartial manner.

The last contention of the teacher was that she was discharged without the local school board making specific findings of fact based upon the evidence adduced at the hearing which sustained the charges against her. The court agreed with this argument, since under previous Florida cases, "[a] final order of a county school board terminating a teacher's contract of employment which is couched in such general language as to amount to nothing more than a verdict of 'guilty as charged' is insufficient." The Administrative Procedure Act and due process of law, the court said, dictate that the agency's final action be reduced to writing and contain findings of fact based upon the evidence brought out at the hearing. For this failure, the action of the board was reversed and the case remanded to the board for the entry of an appropriate final order setting forth the findings of fact found from the evidence adduced at the hearing.

Ford v. Bay County Board of Education
253 So.2d 728
District Court of Appeal of Florida, First District, October 28, 1971.

(See case immediately above.)

Following remand to the school board, the board found that the teacher did own and/or operate the liquor store, that she was in possession of illegal gambling paraphernalia, and that she was engaged in an illegal gambling operation contrary to state law. The teacher again sought court review, charging that the board's findings were not supported by substantial evidence.

After giving careful consideration to the record, the court concluded that there was competent, substantial evidence to support the findings

and action of the school board, and no abuse of authority on the part of the board was shown. The decision dismissing the teacher was accordingly affirmed.

Smith v. Board of Public Instruction of Pinellas County, Florida
438 F.2d 1209
United States Court of Appeals, Fifth Circuit,
March 2, 1971. Certiorari denied, 92 S.Ct. 61,
October 12, 1971.

Because of decreasing attendance and rising costs, the Skyway campus of St. Petersburg Junior College was closed in 1967, and its activities were merged into the other two campuses in the system. Nineteen of the 31 black teachers and four of the eight white teachers at Skyway were reassigned to the remaining schools. Seven of the 12 black teachers not immediately reassigned brought suit alleging that they were not re-employed because of their race and contrary to the state teacher tenure laws. Subsequently six of the seven were offered and/or accepted re-employment within the county school system.

The trial court held that the evaluation procedure followed for the selection of teachers to be transferred to available positions on the other two campuses "was honestly and fairly conducted by qualified professionals acting in a professional way, who were not motivated or influenced by racial considerations. The procedures comport with constitutional standards and the law."

The teachers appealed, contending that the trial court had not exercised its jurisdiction to determine if the Florida teacher tenure laws were violated. The applicable tenure laws provided for criteria to be used when a reduction in force was necessary. The appellate court held that the trial court had applied the plain words and clear intent of the tenure statutes, and that its findings were abundantly supported by the record. Accordingly, the decision was affirmed.

The Supreme Court of the United States denied a writ of certiorari for a review of this decision.

Iowa

McGuffin v. Willow Community School District
182 N.W.2d 165
Supreme Court of Iowa,
December 15, 1970.

A discharged teacher appealed from the lower court grant of summary judgment in favor of the board of education. The teacher brought suit in June 1969, alleging a breach of contract by the board by dismissal without notice and a hearing as provided by law.

The teacher was employed for the 1968-69 school year under a contract providing for duties as elementary and secondary art teacher, boys' wrestling coach, and extracurricular duties as assigned by the administration. Under state law, teaching contracts continue automatically unless modified or terminated by mutual consent or unless the teacher is terminated for cause after notice and a hearing. On March 10, 1969, the teacher was given a contract for the 1969-70 school year at an increased salary. Subsequently, on April 21, 1969, the teacher received a letter from the superintendent informing him that the superintendent considered his attitude toward the rules of the school district to be insubordination and that he felt that this was grounds for dismissal under state law.

Three days later at a special meeting of the school board the attitude of the teacher was discussed, and two motions were passed. The first offered to pay to the teacher the balance of his 1968-69 contract and to end his tenure as an art teacher on April 25, 1969, if he would resign his 1969-70 contract. The second resolution provided that if the teacher did not accept this offer, he would be notified, according to law, of a meeting to be held relative to the accusations against him.

A conference was then held between the teacher and the president of the school board at which the teacher was asked to resign in exchange for a lump-sum payment with no duties to perform to the end of the school year. The teacher refused and reported to school the next day prepared to teach. He was told by the superintendent that his art classes were cancelled for that day. The teacher alleged that he was prevented from teaching after April 25, 1969. However, no claim was made that such action was at the direction of the school board. Subsequently the teacher was sent a notice of termination setting forth August 1, 1969, as the date for a hearing. The teacher did not appear and was dismissed for cause by the board.

The present suit involved an alleged anticipatory breach of contract with the teacher contending that he was discharged on April 25, 1969, by the action of the superintendent in telling him that his classes were cancelled. On the other hand, the school district alleged that the teacher was not discharged until after the board hearing on August 1, 1969, that no action was taken prior to that time although discharge was contemplated, that the teacher received his regular paychecks for the balance of the school year, that the teacher was

not officially relieved of his duties prior to the hearing, and that at the time this action was begun, the teacher had not been discharged.

The appellate court agreed with the trial court that the teacher had not been discharged prior to August 1, 1969, and that his failure to pursue his administrative remedies by appealing his dismissal on that date was fatal to his court suit.

Pointing out that state law governs a teacher's contract of employment, the court said it could find no method of discharge other than that specified in the law, namely, by majority vote of the board. Therefore, it must be assumed that a dismissal other than by school-board action was ineffective. The action of the superintendent in cancelling the teacher's classes could not be effective to dismiss that teacher, and the teacher knew or should have been aware of this when he was given copies of the board action stating that before his duties were officially terminated, he would be given notice and a hearing according to law. The teacher's contract also provided for duties other than as an art teacher so that even if the superintendent had relieved him of his art classes, he was still subject to assignment elsewhere.

The court concluded that the teacher's contract was not anticipatorily breached by the school district, that his lawsuit was premature and by bringing it the teacher could not avoid the effect of a later dismissal under state law, since the teacher did not appear at the August 1, 1969, hearing or pursue his administrative remedy of appeal of the decision reached by the board at the hearing. The trial court correctly granted the motion of the school board for summary judgment, and that decision was affirmed.

Louisiana

Cornist v. Richland Parish School Board
448 F.2d 594
United States Court of Appeals, Fifth Circuit,
September 17, 1971.

A black tenured public-school teacher brought a federal civil rights action alleging that her termination was racially motivated. The district court found that the teacher, who had been with the school system for about 27 years, was terminated for reasons other than desegregation and she should have exhausted her state administrative remedies prior to bringing the federal court suit. Therefore, the court held that it did not have jurisdiction and dismissed the suit. The teacher appealed.

Prior to her discharge the teacher had received a letter from the school superintendent stating that she was doing an "excellent job" and asking that she continue to teach in the 1970-71 school year. The problem resulting in the teacher's discharge was that she had received material from the U.S. Department of Health, Education, and Welfare entitled *Integration and Desegregation* containing a phonograph record explaining how to approach problems resulting from desegregation. She played the record for her class, using the bulletin to supplement the record. The following day the record was seized by a school official. Two days later she was summoned to the superintendent's office and reprimanded, and was told that she should be severely punished for playing the record; further if it were discovered that she ordered the record from H.E.W., she would be fired. Shortly thereafter the teacher was ordered off campus. Subsequently, she was told the board had voted to terminate her contract and that she was entitled to a hearing. A short time later she received a notice that the charges were withdrawn and that she was to resume her teaching duties. However, six days later she was notified that she was suspended and that a hearing would be conducted. Following the hearing, the board voted to terminate the teacher's services.

The state teacher tenure statute which provides for a hearing also provides in part that a teacher may be dismissed for "advocating or in any manner performing any act toward bringing about integration of the races within the public school system." The statute additionally provides that a teacher found guilty after a hearing may petition a state court for a review of that action.

The only issue before the appellate court was whether the teacher was required to exhaust her state remedies prior to bringing this action. The appellate court found the law well settled to the contrary and ruled that the teacher's complaint "clearly states a cause of action peculiarly lending itself to the invocation of federal jurisdiction," considering that this case is not one which involves the untangling of state law before the federal case could proceed. Under the circumstances, the federal district court should have exercised jurisdiction. Therefore, its decision was reversed, and the case was remanded for a hearing on the merits.

Pardue v. Livingston Parish School Board
251 So.2d 833
Court of Appeal of Louisiana, First Circuit,
August 6, 1971; rehearing denied
September 14, 1971.

A guidance counselor appealed from the lower court decision dismissing her suit. After having

been a guidance counselor since the fall of 1966, she was reassigned as an English teacher for the 1970-71 school year. She charged that this was a demotion in violation of the state teacher tenure law.

Although the salaries for the two positions are the same, to serve as a guidance counselor, one must have a teacher's certificate, three years' teaching experience, a master's degree, and 15 hours of instruction in guidance counseling. To serve as an English teacher requires only a certificate in that field. There was no complaint about the teacher's performance. The reassignment was solely because of a federal court order mandating faculty integration in the school district.

The teacher maintained that she was illegally demoted, while the school board argued that there was no difference between the two positions, and therefore, no demotion. Under provisions of the tenure law, to demote a teacher the board would have to have valid cause expressed in writing for a probationary teacher and written and signed charges and a hearing in the case of a tenured teacher. Since none of the statutory requirements was fulfilled, the court found it unnecessary to determine if the teacher was tenured or not.

While a transfer to a position of the same salary and status would not be a demotion and would be permissible, in this instance the court found that the status of the two positions was not the same. It was evident to the appellate court that since the minimum educational requirements of the position as guidance counselor were higher than those for a teacher, a guidance counselor must enjoy higher professional standing even though the salaries of the two positions are the same. The court held that the transfer was a demotion to a position of lesser professional standing attempted without compliance with the tenure law. Therefore, the court reversed the decision of the trial court and enjoined the school board from transferring the teacher.

Maine

Beattie v. Roberts
436 F.2d 747
United States Court of Appeals, First Circuit,
January 6, 1971.

A discharged tenure teacher appealed from a decision of the district court granting summary judgment in favor of the Windham school system. The teacher had been employed by the system for five years when the school committee voted not to renew his contract. The teacher requested and was granted a list of reasons for the nonrenewal and a hearing before the school committee. At the hearing both parties were represented by counsel; witnesses were present, and a stenographer recorded the proceedings. The teacher's counsel raised several procedural objections because the hearing was not public, because the witnesses were sequestered, and because he was denied permission to cross-examine committee members. The committee refused to sustain these objections. The teacher then refused to participate further in the proceedings.

The teacher then brought suit under the federal civil rights act, alleging a denial of due process. The district court held that the teacher had been afforded due process and that he had failed to exhaust his administrative remedies prior to bringing suit. The teacher appealed from this decision.

While ordinarily persons bringing suit under the civil rights act are required to exhaust their administrative remedies first, the defense of failure to do so could not be asserted by the school officials if they had short-circuited the teacher's statutory procedural rights. In this instance the teacher asserted that his procedural rights had been violated in two ways. First, the teacher read the applicable statute to require that the superintendent notify the teacher prior to the time that he recommended dismissal to the school committee. The appellate court found no basis in the statute for the teacher's interpretation. The court observed that the statute plainly required that the teacher be given notice "that his contract is not going to be renewed," not notice that the superintendent has recommended nonrenewal. The language of the statute, the court said, contemplates action by the entire committee before the teacher is notified.

The second procedural error alleged by the teacher was that he was not given an adequate statement of the reasons for nonrenewal, as required by the statute. He protested that the list of reasons came from the committee's attorney and not from the committee. The court found that the teacher was clearly put on notice of the charges against him. In view of the manner in which the hearing before the committee was conducted, including a stenographic record, the court could see no justification for the teacher's refusal to follow the proceedings through to the end.

Alternatively, the teacher claimed that the procedure was constitutionally objectionable because the hearing was not held before a neutral decision-maker. This argument was presented for the first time on appeal. The appellate court said that notwithstanding the obvious inappropriateness of considering an issue neither pleaded nor argued in the

district court, it might on rare occasion consider the issue if the facts clearly pointed to a deprivation of constitutional rights. However, the appellate court did not find this to be the case here. State law did not require a neutral decision-maker, and the court was unwilling to impose this requirement on the state or municipalities because, in its words, "we would be engrafting into educational administration an appellate layer of enormous complexity, and might well exceed the boundaries of our judicial authority and trespass into legislative territory."

Furthermore, the appellate court said that the teacher's "dual failures to exhaust his administrative remedies and to present the issue to the district court have foreclosed any analysis of the workings of the present Maine procedures, an exploration we would deem essential to any sensible balancing of the interests of tenured teachers and school committees." The decision of the district court in favor of the school committee was affirmed.

Dunham v. Crosby
435 F.2d 1177
United States Court of Appeals, First Circuit,
December 18, 1970.

A high-school teacher brought a civil rights action against the superintendent and the members of the board of directors of Maine School Administrative District Number 34. The teacher alleged that his employment was terminated during the school year for reasons and by a procedure that violated his constitutional rights. The district court dismissed the claim and the teacher appealed.

The teacher's employment required a certificate which he did not hold because he lacked the requisite educational credits. However, in a previous year he had held a conditional certificate that permitted him to teach. Renewal of this certificate was conditioned on obtaining an affidavit from the superintendent. The teacher had signed a contract for the 1969-70 school year and was teaching ninth-grade English, but without his certificate because the necessary affidavit had not been signed by the superintendent, apparently due to an oversight.

For the first two months of the school year the teacher was employed without the conditional certificate. On October 28, he composed an assignment sheet listing several themes of *Romeo and Juliet* for oral and written discussion. The daughter of a school-board member was in his class, and she showed the assignment sheet to her father who took it to a school board meeting that night. The board asked the superintendent to investigate. The next day the teacher was called out of his class by the superintendent and was told that he could leave quietly or make a fuss. The teacher was then fired and paid off. This dismissal was accomplished by the superintendent making it clear to the teacher that he would not sign the affidavit needed for the teaching certificate. When the teacher protested the decision of the superintendent during the interview and asked what the school board thought of the sheet, the superintendent told him that a hearing before the school board would do him no good. The teacher requested no hearing. The lower court had found that the failure to sign the affidavit was because of the assignment sheet.

The district court had ruled that there was no evidence that the members of the school board had conspired to deprive the teacher of his constitutional rights. The teacher argued that the board's authorization of the superintendent to investigate the assignment sheet and its subsequent approval of a contract for the person hired to replace him constituted a ratification of the superintendent's action, implicating the board members in the conspiracy. The district court found the facts to be otherwise. This finding was upheld.

On appeal the teacher added another twist to his ratification theory. He claimed that the fact that the school board chose to defend the lawsuit by denying that he was legally employed and by counterclaiming for salary paid to him, constituted a ratification of the superintendent's failure to sign the affidavit; therefore, the board members were liable to him. As to this claim the court said it was doubtful that the civil rights act was applicable for vicarious liability. Furthermore, the teacher produced no evidence that the board had control over the decision of the superintendent not to sign the affidavit. Therefore, the appellate court affirmed the district court's dismissal of the action against the members of the board of education.

The appellate court, however, found quite a different case against the superintendent. In the lower court the superintendent had argued that the teacher was not fired, but rather that he was never legally hired and, therefore, he had no procedural rights to exhaust. The district court, however, impliedly rejected this theory and ruled that the teacher had failed to exhaust his administrative remedies. The superintendent then claimed on appeal that procedures were available to the teacher under state law which he did not exhaust.

Under state law, the dismissal procedures are self-starting. A teacher need not request a hearing; he can be discharged only after notice and a hearing. None of these procedures was complied with

by the defendants. The appellate court said that the superintendent could not argue that the teacher failed to request a hearing when he was automatically entitled to one without making a request. Nor could the superintendent rely on the teacher's failure to exhaust his administrative remedies when he took steps to deny the teacher access to the procedure. For it was the superintendent who dismissed the teacher by not signing the affidavit instead of bringing the case to a hearing before the school board as required by law, and who actively discouraged the teacher from seeking a hearing by telling him that a hearing would do him no good.

Accordingly, the appellate court reversed the decision of the district court and remanded the case to that court for proceedings against the superintendent alone.

The counterclaim by the board against the teacher to recover the salary paid was dismissed by the lower federal court without prejudice so that the matter could be resolved in state court. The teacher argued on appeal that the claim should have been dismissed with prejudice. The appellate court declined to reverse the district court disposition of the counterclaim but remanded the case for further consideration in light of the reinstatement of the complaint against the superintendent.

Michigan

Dodge v. Board of Education of the School District of the City of Saginaw
183 N.W.2d 793
Supreme Court of Michigan,
March 1, 1971.

(See *Teacher's Day in Court: Review of 1969*, p. 26.)

An elementary-school principal was relieved of her duties and offered an option of employment at the same pay either as a reading improvement coordinator or as a classroom teacher. She accepted the latter position with objection, and then brought suit maintaining that she had tenure as a principal and, therefore, had been improperly demoted. The trial court denied relief and the principal appealed.

The appellate court pointed out that the explicit statutory language provided that if the employment contract of a tenure teacher in the capacity of principal provides that the teacher will *not* have tenure as a principal, the teacher will have tenure as a classroom teacher only. Further, the statute also provided "that the *failure* of the board to so provide in the contract shall be deemed to constitute the employment of the teacher on continuing contract in such capacity [principal]" and subject to the provisions of the tenure act.

In this instance the word "tenure" was stricken from the standard printed form contract. The school board argued that this was the equivalent of the statutorily required provision that the teacher would not have tenure as a principal. The appellate court disagreed and held that the contract must make provision for *no* tenure in order to avoid it. While the court was of the opinion that the school board did not intend to grant the plaintiff tenure in the capacity of principal, the board did not avail itself of the only means available under the statute to avoid it. Therefore, the lower court decision was reversed, and the principal was ordered restored to her position as elementary-school principal and to the salary difference between the two positions as of February 1967.

Munro v. Elk Rapids Schools
189 N.W.2d 224
Supreme Court of Michigan,
August 27, 1971.

(See *Teacher's Day in Court: Review of 1970*, p. 39, *Review of 1969*, p. 27.)

In this case the Michigan Supreme Court had previously affirmed two lower court decisions against the teacher. This appearance involved a rehearing of the case.

After completing the two-year probationary period and being rated satisfactory, the teacher was not rehired. He argued that, having satisfactorily completed the probationary period, he was entitled to tenure. The school board's contention was that two separate acts were required, satisfactory completion of the probationary period and appointment to tenure.

On rehearing, the court adopted what had been the minority opinion in the original hearing that two separate acts were not required and that once the teacher had satisfactorily completed the probationary period he was entitled to tenure. That opinion was not saying that the board lacked discretion to retain or not to retain a probationary teacher. "The probationary period is just that—a period of proof." Rather, the opinion was saying "that the intent of the *entire* act [tenure act] was to eliminate capricious and arbitrary employment practices of local school boards. This includes the probationary as well as the tenure period of employment." (178 N.W.2d 450 (1970)).

In adopting this minority opinion, the Michigan Supreme Court ruled that unless the board notified a probationary teacher in writing that his work was unsatisfactory, upon completion of the

probationary period he was entitled to tenure status with all of its specified rights and privileges.

Rumph v. Wayne Community School District
188 N.W.2d 71
Court of Appeals of Michigan, Division 1,
March 24, 1971; rehearing denied May 11, 1971.

A tenure teacher was granted sabbatical leave for one school year at half salary for the purpose of foreign travel and research. As a condition of that leave he was required to file an interim report with the school superintendent at the mid-point of the leave. This he failed to do and his salary was suspended. Upon his return to the United States the teacher met with the school officials. At this meeting he was informed that he would not be offered a contract until his legal status was determined. Shortly thereafter he was informed that a contract would not be issued to him for the next school year because of the board's belief that he had breached his sabbatical leave agreement. The teacher requested and received a hearing before the board which then upheld the decision not to offer him another contract. On appeal to the state tenure commission and the trial court, the action of the board was affirmed. This appeal followed.

The only issue on appeal was whether the teacher's employment was terminated in accordance with the state tenure law. The discharge of a tenure teacher requires notice, a written statement of the charges, and a hearing. The board admitted that none of the procedural safeguards was followed, except the hearing, but maintained that because the teacher breached the leave agreement, he was not entitled to these protections. The board relied on a statute which provided that a tenure teacher who discontinued his services except by mutual consent without giving 60 days' notice prior to September 1 of the ensuing school year loses his rights to continuing tenure. The trial court had interpreted this to mean that the teacher, by breaching the leave agreement, had lost his rights to continuing tenure, including the procedural safeguards for dismissal of a tenure teacher.

The appellate court did not accept this interpretation of the statute. In its view, the section relied on by the board was intended to prevent teachers from leaving school districts immediately prior to the beginning of school time, thus leaving the school board without sufficient teachers or time to replace them. The interpretation given this section of the tenure law by the state tenure commission and the trial court was, in the opinion of the appellate court, inconsistent with the legislative intent. The rights lost were those acquired by teachers on continuing tenure, and those rights are lost only if the teacher resigns without giving 60 days' notice.

The appellate court said that discharge of a tenure teacher can be accomplished only by strict compliance with the procedural safeguards provided by the tenure law. The appellate court held that the dismissal of the teacher in this case was procedurally defective because of noncompliance with the law. Therefore, the court reversed the decisions of the state tenure commission and trial court that the teacher forfeited his rights under the tenure law.

New Hampshire

McDonough v. Kelly
329 F.Supp. 144
United States District Court, D. New Hampshire,
July 28, 1971.

A dismissed Manchester teacher brought suit against the superintendent of schools and the individual members of the board of education, charging that his dismissal did not meet the constitutional requirements of the due process and was therefore invalid.

The teacher had taught mainly in junior high school and was also active in local politics. During the 1968-69 school year the teacher was unhappy with his assignment. He did not return his contract for the 1969-70 year which was sent out in May 1969, asserting that he had never received it. Also, he had stated to his principal that he was "going to look for something else." During the summer of 1969 much correspondence took place between the teacher and the superintendent, but it remained unclear as to whether the teacher would return in September. However, in September the teacher was offered another assignment at an elementary school. He thought that this was to be a temporary assignment until a position was available at the junior high-school level. The superintendent intended that it be a permanent assignment. Another 1969 contract was sent to the teacher; he did not return it, again asserting that he never received it. Difficulties persisted with regard to the assignment, and meetings were held and letters exchanged, with the teacher apparently wishing to be dismissed so that he could receive a hearing before the school board. Ultimately, the teacher was notified of dismissal, and a hearing was held with 13 of the 15 members of the board present. The rules of the school board require an affirmative vote of the majority of the entire board for dismissal. There was not a clear majority of the board

voting for dismissal, and another meeting was held. At the second meeting one of the members who was not at the first meeting cast the deciding vote for dismissal.

The first question before the court was whether the teacher was entitled to a hearing at all. The school board maintained that he was not since he had no contract for the 1969-70 school year. The court said that this overlooked the fact that the superintendent assumed that his position was permanent, and that regardless of his contract status the teacher had been hired for the 1969-70 school year. Additionally, state law grants tenure rights to a teacher who has taught for three or more years. Since this teacher had done so, the court held that the teacher was entitled to a hearing on the question of dismissal.

The next question before the court was whether the hearing that was held satisfied due process. The teacher had asserted that the notice was defective because it failed to inform him of his right to be present and represented by counsel. The court did not agree, noting that the teacher was fully aware of his right to appear as indicated by his previous correspondence. Also, his political involvement would apprise him of his rights. The court also found that the teacher had waived his right to have counsel present. As to the hearing itself, the court found that it was fair and satisfied constitutional requirements. The teacher was given a chance to present his case and cross-examine witnesses.

What the court did find to be defective was the procedure followed by the board after the hearing. The missing member who cast the deciding vote had not been present at the hearing and had not heard the teacher's case. He did, however, discuss the case at length with the superintendent and other members of the school administration. The court held this to be a blatant violation of the teacher's constitutional rights to due process under the Fourteenth Amendment. "The word hearing itself means that those sitting in judgment shall be present to 'hear' the evidence," the court said. Because of this violation the court ruled that the action of dismissal was null and void.

On the issue of damages the court ruled that the teacher was not entitled to recover for two reasons. First, that suit had been brought against the individual members of the board in federal court rather than against the board itself in state court. The other reason for the court's denial of damages was the conduct of the teacher. The court said that his whole course of conduct "evinces clearly that unless he could get a teaching assignment satisfactory to him, he would risk dismissal in the hope that the hearing that was required would result in such an assignment." The teacher was ordered reinstated as a tenure teacher with his assignment left to the discretion of the school administration.

New Mexico

Fort Sumner Municipal School Board v. Parsons
485 P.2d 366
Court of Appeals of New Mexico,
April 23, 1971. Certiorari denied, Supreme Court of New Mexico, 485 P.2d 357,
May 19, 1971.

The local board decided not to re-employ a tenure teacher because of a reduction in student enrollment while retaining two nontenure teachers. The tenure teacher appealed to the state board which reversed the action. The local board appealed.

Facing a decrease in student enrollment and concomitant decrease in funds, the board determined that the number of classes offered in certain subjects should be reduced, principally in the area in which the tenure teacher was certified to teach. The basis for the local board's action in dismissing the tenure teacher while retaining two nontenure teachers was that the tenure teacher was certified only to teach English-language arts and social studies, which both of the nontenure teachers were eligible to teach. Additionally, one of the nontenure teachers was qualified to teach Spanish and the other, physical education and athletics. Spanish was the only foreign language that anyone in the school district was qualified to teach. To be accredited a school system was required to teach one foreign language. The only other teacher in the system certified to teach Spanish was also the only teacher certified to teach special education. The teacher certified to teach physical education was the only teacher in the school system so certified, and physical education was required by state law. Thus, the local board was faced with either failing to re-employ a tenure teacher or not offering required subjects.

The state board, joined by the teacher, emphasized on appeal the public policy of retaining experienced teachers through indefinite tenure during satisfactory performance. The teacher also argued that even in the interest of preserving the curriculum the local board may not retain a nontenure teacher while dismissing a teacher with tenure. The position of the local board was that the rights and welfare of the schools and the children could not be subordinate to the rights of a tenure teacher.

It was the opinion of the court that the answer to this point did not require that a choice be made of the allegedly competing public policies. Rather the question was whether there was substantial evidence supporting the local-board decision. The court held that there was substantial evidence since there was an affirmative showing that there was no position available to the tenure teacher which she was qualified to teach. For if she was re-employed, the program of the school would be seriously affected.

The state board and the teacher argued, however, that the decision of the state board should be affirmed because there was substantial evidence to support its reversal of the local-board decision. The court disagreed on the basis that state board review is limited to a finding of whether or not there was evidence to support the local-board decision. In this instance the court determined that the state board had unreasonably held that there was no substantial evidence to support the local board decision. The decision of the state board was reversed and that of the local board affirmed.

Lenning v. New Mexico State Board of Education
485 P.2d 364
Court of Appeals of New Mexico,
May 7, 1971.

The Roswell Independent School District refused to re-employ a tenure teacher and the state board affirmed this decision. The teacher then appealed.

The charges against the teacher, which were found to be supported by the local board were incompetency, insubordination, violation of contract, violation of the local-board rule regarding corporal punishment, and improper and unprofessional conduct.

The teacher contended that she was dismissed for unsatisfactory performance, and accordingly she was not afforded the procedural safeguards of the state board regulations. These regulations provide that before a tenure teacher may be dismissed for unsatisfactory performance, three conferences must be held with the teacher's immediate supervisor or some other person designated by the board. A written record of such conferences must be kept and signed by both parties. Refusal to sign must be noted on the record.

The first attempt of the principal to meet with the teacher resulted in the teacher's refusing to sign the record and returning it stating that she would not sign until she had a conference with the personnel director or the superintendent. The second attempt resulted in the teacher's refusing to meet with the principal and telling him "to tell it to her lawyer." No further conferences were attempted.

In reaching its decision the court assumed that the refusal of the local school board to re-employ the teacher was on grounds of unsatisfactory performance. The question, therefore, was whether there was a substantial departure from the rule of requiring prior conferences. In the opinion of the court there was no substantial departure. Although the rule requires three conferences, the court found implicit in the rule the requirement that the teacher cannot thwart the law or regulation by refusing to confer. In view of the teacher's refusal to confer, the court said, she cannot now complain of the failure to give her three conferences.

The teacher also contended that the findings of the local board were not supported by the evidence. On review of the record, the court concluded that the findings were supported by substantial evidence in every detail, and upheld the decision of the state board against the teacher.

McAlister v. New Mexico State Board of Education
487 P.2d 159
Court of Appeals of New Mexico,
June 11, 1971.

An elementary-school principal was discharged during his contract term by the Hobbs Municipal School Board. On appeal, the state board affirmed the decision of the local board. The principal then appealed to the court.

The main reasons for the action of the local board were that a reading program at the principal's school departed from the self-contained classroom basis and that this program was conducted with his knowledge and approval. In permitting this program the principal did not seek approval from anyone. There was evidence that the superintendent had told the principal not to depart from standard procedure without prior approval. However, the principal maintained that he had the authority as principal to effect this program and did not need approval. This program formed the basis of the charge of insubordination against the principal.

The principal's first argument on appeal was that the reading program had been in effect in prior years and, therefore, could not be a basis for discharge during his current contract. In this he relied on a New Mexico case holding that "matters which occurred under a previous contract would not support cancellation of a subsequent contract." The court held that case inapplicable because although his departure from the standard

classroom organization had occurred previously, it did not alter the fact that insubordination had occurred under the current contract.

The principal also complained that four written exhibits presented at the local board hearing should not have been admissible because they were hearsay and prejudicial to his interests. All four of the exhibits had some bearing on the principal's knowledge that he should obtain higher approval prior to changing classroom structure. The court did not find them prejudicial to the intersts of the principal since none contained evidence of insubordination during the current contract term but each tended to establish that the current insubordination was willful.

The principal's third point on appeal was that certain written statements were presented to the board by the superintendent in support of his recommendation that the principal be terminated and that some of these were later also used at the local board hearing. This, the principal claimed, was prejudicial. The court did not find this prejudicial since under state law there still must be evidence substantiating the discharge for cause.

The principal also claimed that he was entitled to, but did not receive, proper notice pursuant to a state board of education rule that written notice of discharge or termination of services for unsatisfactory work performance shall be served at least two weeks prior to the end of the school year. His notice of discharge was served in July, sometime after the close of the school year. The court rejected this contention, saying that the two weeks' notice applies to termination situations, and was not applicable to the principal's notice of discharge during the term of his existing contract.

New York

Bailey v. McDougall
320 N.Y.S.2d 271
Supreme Court of New York, Queens County,
December 18, 1970.

Following disruptions and demonstrations at a junior high school in New York City that closed the school for two days, some of the teachers did not return to school but continued to protest outside the school. After one week the teachers decided to return to work but prior to this they all received telegrams from the community superintendent notifying them that they were "temporarily assigned" to duty at another school pending investigation of their conduct at the junior high school. Four of the teachers were tenured, the rest were not.

The teachers brought an action to force the superintendent to rescind the transfers and to allow them to continue their duties at their former school. The superintendent alleged that the telegrams were sent to remove the dissident teachers from the disorderly scene in front of the school.

The teachers charged that they were transferred in violation of the education law. The superintendent, on the other hand, maintained that they were "temporarily assigned" and not transferred. Under the education law providing for the creation of the community school districts in New York City, the community superintendent has the power to transfer teachers without their consent for certain enumerated reasons, including disciplinary action, and in the case of tenure teachers, following charges and a hearing. The court found that the temporary assignments for an indefinite time constituted transfers within the meaning of the law and could not be accomplished except in accordance with its provisions. The court concluded that the attempted transfers of the teachers who had tenure were invalid since they were not as a result of charges and a hearing at which the teachers were found guilty.

As to the nontenure teachers, the court noted that under the law it was not necessary that they be given a hearing on a transfer. Accordingly, the requested relief was denied as to the teachers without tenure.

Karin v. Board of Education of Central School District No. 1
317 N.Y.S.2d 465
Supreme Court of New York, Oneida County,
December 7, 1970.

A teacher brought a proceeding against the board of education, seeking to set aside its determination dismissing her from her position. Sometime in the fall of 1969, the teacher had been served with written charges by the school district. She was charged with refusing to accept her assignment, failing to attend school to perform her duties, and failing to present any medical evidence as to any claim of illness or disability. Following a hearing on these charges, the board dismissed the teacher. The teacher appealed to the state commissioner of education who upheld the action of the local board. An appeal was then taken to the court.

The statute applicable to teacher dismissal provides that following the action of the board of education an appeal may be taken to the commissioner or to the court. If the teacher elects to appeal to the court, the action of the board shall be deemed final for the purpose of such proceeding.

It was the opinion of the court that the decision of the school board on November 11, 1969, was a final decision and that the action brought by the teacher was therefore barred by the statute of limitations since it was not brought within four months as required. Additionally, the court found the teacher's action barred since she had elected previously to appeal to the commissioner under the statute to review the school board's determination, and having exercised this right of election of remedy, could not later bring a proceeding in the court. The petition of the teacher was dismissed.

LeTarte v. Board of Education of the Lake Pleasant Central School District
316 N.Y.S.2d 781
Supreme Court of New York, Hamilton County
December 30, 1970.

A supervising principal sought a review of the determination of the board of education suspending him without pay from September 8, 1970, to November 16, 1970.

On September 28, 1970, a total of 22 charges were preferred against the principal, and he was suspended without pay pending a hearing on the charges. Pursuant to state law a hearing was held before a panel which found cause for action on three of the charges and no cause for action with regard to the other 19 charges. The panel recommended 14 days' suspension without pay. Following receipt of this report the board of education determined that there was no cause with regard to 11 charges but that there was cause with regard to the other 11. The board gave reason for each finding, imposed no penalty on three charges, but specified disciplinary penalties for the other eight and suspended the principal without pay for a total of 69 days.

The principal maintained that the determination of the board was arbitrary since it imposed a penalty far in excess of that recommended by the hearing panel, and that since the board decision was based on the same evidence reviewed by the panel, the board should be required to accept the findings and recommendations of the panel.

Reviewing the state law applicable to charges against teachers, the court noted that the statute required that following the receipt of the report of the hearing panel "the employing board shall determine the case by a vote of the majority of all the members of such board and fix the penalty or punishment, if any." The court held that the findings and recommendations of the hearing panel referred to in the statute "are simply advisory in character and not in any way conclusive upon the employing board." To hold otherwise, the court continued, would render meaningless the statutory requirement that the board determine the case and fix the penalty. Therefore, while the statute authorizes the hearing panel to make findings and recommendations, the power "to determine the case" is vested in the local board. Thus, the issue before the court was whether the board had acted arbitrarily.

The court stated that the scope of its review of school-board acts was limited to a consideration of whether there was substantial evidence to support the findings. Further, in reviewing the punishment, the court could consider only whether the penalty was so disproportionate to the offense as to be arbitrary and capricious or an abuse of discretion. In looking at the record in this case the court found substantial evidence to support the board's determination and disciplinary action. However, the court did feel that the total punishment imposed was somewhat excessive. The total penalty was reduced to 50 days' suspension with reinstatement directed as of October 28, 1970.

Lippold v. Board of Education of the City of New York
324 N.Y.S.2d 650
Supreme Court of New York, Special Term, Kings County, Part I, August 18, 1971.

A high-school mathematics teacher asserted that he had acquired tenure and sought to annul the action of the board of education in terminating his services without a hearing. The teacher had served as a regular substitute teacher for the 1966-67 and 1967-68 school years at the same high school. He received satisfactory ratings for both years. For the 1968-69 school year he received a regular appointment, again at the same school under the same principal and again received a satisfactory rating. Early in the 1969-70 school year the teacher was informed by the board of examiners that his license would be terminated on June 30, 1970, for failure to complete various course requirements. On June 6, 1970, the school board told him that because of the termination of his license his services would also be terminated as of the same date. The teacher then wrote to the board, stating that by reason of his substitute service he had acquired tenure and his license could not be revoked without a formal hearing. The board replied that although he was eligible to claim his substitute service toward fulfillment of the required probationary period, the claim must be made within 30 days of regular appointment, and

since the teacher had not filed for the credit, he had not acquired tenure.

It is established law in New York that a teacher who has served a satisfactory probationary period and has acquired tenure, cannot be summarily dismissed without a hearing and charges on the ground that he has failed to meet eligibility requirements for his position. State law provides that the probationary period may be from one to three years to be fixed by the board of education except that in the case of a teacher who has rendered satisfactory service as a regular substitute for a period of two years, the probationary period shall be limited to one year. The board of education asserted that for the past 25 years it had required teachers to specifically apply for this substitute service credit within 30 days of regular appointment. The reason given for this requirement was to put the principal on notice that the teacher was in the last year of his probationary period so that there would be adequate time for evaluation. The board asserted that it would be "an impossible burden" on it to keep track of which teachers were eligible for the substitute service credit because thousands of new teachers were appointed each year.

The court held that since state law gave the benefit of the substitute service credit automatically, it was not within the power of the board to require the teacher to apply for the credit and to put a time limit on that application. The court said that the board's administrative difficulties must be solved in a manner other than clashing with the plain provisions of the statute, notwithstanding the fact that the procedure had been utilized for 25 years. The court also noted that in this instance the board had not been misled by the teacher's failure to apply for the credit since he had taught in the same school under the same principal for almost three years when he was rated at the end of the probationary period.

Accordingly, the court held that the teacher had satisfactorily completed his probationary period and had acquired tenure. As a tenure teacher, he could not be removed from his position without charges and a hearing. The relief sought by the teacher was granted.

Powell v. Board of Higher Education of the City of New York
325 N.Y.S.2d 14
Supreme Court of New York, Special Term, New York County, Part I, October 4, 1971.

The former president of Kingsborough Community College brought suit against the board of higher education, seeking reinstatement to his position on the grounds that no formal charges were ever served upon him as required by the board's bylaws. The board took the position that procedural and substantive due process did not extend to the president under circumstances that involved removal from an administrative position only.

The court said that a close reading of the pertinent sections of the bylaws clearly indicated that members of the instructional staff, of which the president is concededly a member, may be removed for cause subject to formal charges and a hearing. Since the bylaws did not attempt to limit the definition of service or duties to exclude administrative services or duties, the court ruled that the president was entitled to the due process procedures set out in the bylaws and that the actions of the board were arbitrary. Accordingly, the requested relief was granted.

Sife v. Board of Education of the City of New York
317 N.Y.S.2d 557
Supreme Court of New York, Special Term, Kings County, Part I, November 17, 1970.

A tenured high-school teacher in New York City brought this court proceeding, challenging his suspension without pay following the filing of charges for incompetence and inefficiency. He claimed that under the law he was entitled to receive full compensation during the period of suspension.

The statute relied upon by the teacher was the decentralization law applicable to New York City schools. The statute provided that teachers under the jurisdiction of the Community Board would receive full compensation during a period of suspension. However, the court found that community boards did not have jurisdiction over senior high schools, and in such instances the authority rested with the chancellor who succeeded and retained the powers of the former superintendent of schools with respect to high-school teachers, including the power to suspend teachers without pay. Accordingly, the teacher could be suspended without pay, and his petition was therefore dismissed.

Siniapkin v. Nyquist
325 N.Y.S.2d 823
Supreme Court of New York, Special Term, Albany County, November 15, 1971.

A former school psychologist petitioned the court for a review of the decision of the state com-

missioner of education dismissing his appeal from his discharge. Prior to the 1968-69 school year, the psychologist had attained tenure in his position with the Board of Cooperative Educational Services (BOCES). During 1968-69, he and another psychologist without tenure worked full time. At the end of the year, the psychologist in this proceeding was notified that his services were being discontinued because of a curtailment of funds. According to records for the 1969-70 school year, two part-time psychologists were employed by BOCES. In dismissing the appeal the commissioner decided that since neither of the two part-time positions constituted a full-time position, the psychologist had no legal claim because part-time positions are not covered by the tenure law.

The court noted that the authorities relied upon by the commissioner held that part-time employees gain no tenure in their positions regardless of length of service and, therefore, are not entitled to appointment by reason of tenure if the position is converted to full time. However, the court said that these holdings do not serve the converse proposition that would permit an already tenured employee in a full-time position to be replaced by junior-tenured or nontenured personnel when his full-time position is converted to part-time. The court held that "[t]enure once obtained in a full-time position should prevail in that position even though the position is converted to part-time."

Since the full-time and part-time positions of school psychologist were in the same tenure area, the court ruled that the psychologist had the right to claim the protection of the sections of the education law which provide that the creation of a similar position within the same tenure area will entitle the tenured employee of the position abolished to the new position or status on a preferred list for a similar position. The case was therefore remanded to the commissioner for a determination concerning whether BOCES acted in good faith in converting the full-time position of school psychologist into a part-time position; whether the positions converted were in fact part-time; whether the psychologist was offered either of the converted positions, or placed on a preferred list with regard thereto; or whether his tenure was properly credited in relation to those who were placed in the positions. Should it be determined that the BOCES acted erroneously, the psychologist would be entitled to an order appointing him to the position if it still exists. If there is no position, the commissioner must determine if the psychologist is entitled to damages by way of lost salary because of the failure to appoint him to one of the converted positions.

Walsh v. Nyquist
325 N.Y.S.2d 103
Supreme Court of New York, Appellate Division, Third Department, October 21, 1971.

Following a hearing held pursuant to the teacher tenure law, the teacher was dismissed by the Sherburne-Earlville Central School District on charges of insubordination, inefficiency, and neglect of duty. The teacher then appealed to the state commissioner of education who sustained the findings of the board but took the view that dismissal was too severe a penalty and converted the penalty to suspension without pay from June 3, 1969, to the date of his decision, February 27, 1970.

The teacher then brought suit to annul the portion of the commissioner's decision relating to suspension without pay. The trial court dismissed the suit. On appeal, the teacher argued that since the charges did not warrant dismissal, the reduction of the penalty to suspension was arbitrary. Under New York law, decisions of the commissioner are final unless they can be shown to be arbitrary. The appellate court held that the action of the commissioner in reducing the penalty was in no sense arbitrary.

The decision of the trial court dismissing the petition of the teacher was affirmed.

Weinbrown v. Board of Education of Union Free School District No. 15
271 N.E.2d 549
Court of Appeals of New York,
June 9, 1971.

A teacher brought an action against the board of education, seeking an order directing it to employ him as a tenured teacher of French. The trial court dismissed the petition, and the intermediate appellate court affirmed. The teacher appealed further.

The teacher was employed on a probationary basis in September 1965. On April 23, 1968, the board accepted the recommendation of the superintendent and appointed the teacher to tenure. He was notified that tenure would be effective July 1, 1968, and was also notified of his projected salary which he accepted in writing. Thereafter, on May 24, 1968, the teacher was notified that the board had rescinded its previous grant of tenure. No reasons were given.

New York tenure law provides that at the expiration of the probationary period the superintendent shall make a written report to the board of education recommending for tenure those persons

found competent, efficient, and satisfactory. Those not recommended for tenure must be notified 60 days prior to the end of the period. The question before the court in this case, whether the tenure notice was effective and binding, depended on whether the board had the power to make an appointment to tenure prior to the end of the teacher's probationary period.

In arguing that it did not have the power to make an appointment prior to the end of the probationary period, the board cited a 1939 New York case. The highest appeals court said that this case was decided 13 years prior to the time that the 60-day notice provision was added, and, therefore, its reasoning did not apply. The court held that the statute did not forbid the offer of an appointment to tenure prior to the end of the probationary period and that the teacher's acceptance of the offer made the tenure appointment effective. Since the appointment to tenure was complete, it could not be rescinded by the board. Accordingly, the decisions of the lower courts were reversed, and the request of the teacher for an order directing the board to employ him was granted.

Ohio

Crabtree v. Board of Education, Wellston City School District
270 N.E.2d 668
Court of Appeals of Ohio, Jackson County, December 28, 1970. Certiorari denied, United States Supreme Court, June 29, 1972. (41 U.S. Law Week 3002).

On April 13, 1970, the superintendent recommended at a meeting of the school board that a teacher not be re-employed. The following day the teacher was sent notice of this action. At the time the teacher was employed under a three-year contract, and had he been re-employed, would have received continuing contract status. The teacher sought an injunction to force his re-employment. He charged that since the regular clerk of the board was not present at the meeting and the board did not appoint one of its members to serve in his place as required by law, the minutes taken at the meeting and the notice sent to him were nullities. The trial court denied relief and the teacher appealed.

The appellate court ruled against the teacher. The court felt that the teacher was attempting to read something into the law that was not there, for if the legislature had intended what the teacher maintained, it would have said that if the regular clerk was not present and the board failed to appoint a clerk *pro tempore*, any action taken would be null. Since this was not what the law said, the court affirmed the holding of the trial court denying the injunction requested by the teacher.
NOTE: The Supreme Court of the United States, denied a writ of certiorari for review of decision.

State ex rel. Gandy v. Board of Education, Continental Local School District
269 N.E.2d 605
Supreme Court of Ohio,
May 5, 1971.

A teacher and/or guidance counselor sued to compel the board of education to issue him a continuing contract. The trial court granted the relief and the board of education appealed.

The teacher had been employed in the district since 1961-62 under provisional or professional teaching certificates and under a provisional pupil-personnel service certificate. When last re-employed, the teacher had held a professional certificate, had taught at least three years in the school system, and had been unqualifiedly re-employed. The teacher testified that he had filed copies of his certificates with the local superintendent. He claimed that since he had met the criteria for a continuing contract, he was entitled to such a contract, effective for the 1969-70 school year.

The school board alleged that the continuing contract was denied on the ground that the teacher did not file a valid professional certificate with the county superintendent and the record cards which tend to support the filing of the certificate did not constitute notice of the teacher's eligibility for a continuing contract. The appellate court found nothing in the statute providing for a particular form of notice that the teacher has met the requirements of continuing contract status. Therefore, the record cards provided sufficient notice to the school officials that the teacher was eligible for a continuing contract.

The second question on appeal was whether a teacher who is eligible for a continuing contract status under the statutory provisions is entitled to continuing contract upon being unqualifiedly re-employed. The appellate court agreed with and adopted the opinion of the trial court holding that the teacher was entitled to a continuing contract.

Pennsylvania

Lakeland Joint School District, Lackawanna County v. Gilvary
283 A.2d 500
Commonwealth Court of Pennsylvania,
November 9, 1971.

On July 1, 1968, the Scott Township school system became part of the Lakeland Joint School District. Prior to consolidation the plaintiff in this case was supervising principal of the Scott School. In anticipation of jointure, an organization committee recommended that the supervising principal of Lakeland hold the same position in the new district and that the Scott building be in charge of a head teacher rather than a principal. The plaintiff here was reassigned as a classroom teacher in another school where a teaching vacancy existed in the subject area for which he was certified. He then filed a complaint seeking the salary difference between his salary in his former position and his salary as a teacher. Preliminary objections were sustained by the trial court which directed that an administrative hearing be held prior to a court action being brought.

The administrative hearing was held before the board of education which affirmed its prior decision. The principal then appealed to the state superintendent of public instruction who, after a hearing, reversed the decision of the board and directed that the principal be reinstated to the position of principal at the Scott School. This would have forced the board to re-establish the position of principal. The reasons given by the state superintendent for his action was that there was no evidence to prove that the board or the committee had consulted the principal or any other educator in the district prior to the board's action.

The school district appealed to the trial court, requesting a hearing *de novo*, which was granted. The trial court found that the principal had been consulted and that there had been nothing arbitrary nor discriminatory about the board's action. Therefore, the state superintendent's decision was reversed, and the board of education action sustained.

This appeal was then taken by the principal. He relied on four factors to show that the action of the board was arbitrary and discriminatory. The first was that he was not given a hearing before the board action was taken. In discounting this factor, the appellate court noted that there was no allegation in the complaint of the principal that a hearing had been requested prior to action being taken. Further, at the subsequent board hearing there was again no allegation that a hearing had been requested earlier. The second contention of the principal was that the duties of a head teacher are the same as those of principal and, therefore, the board action was merely a change in name, a sham to hide the discriminatory demotion. Based on the evidence presented, the appellate court found this to be untrue. The next contention was that the Scott building was the largest attendance center in the district and was now without a principal, and merely in charge of a head teacher. The appellate court said that this was obviously a question of judgment on the board's part; moreover, this contention of the principal was inconsistent with his argument that the duties of a head teacher and a principal were the same. The final contention of the principal was that the school district would have been reimbursed by the state if the mandated position of principal had been continued; this would not occur in the nonmandated position of head teacher. This contention, the appellate court said, merely reinforced the lower court holding that the duties of the two positions were not the same.

The appellate court did not feel that the trial court decision in any way jeopardized the tenure system. When jointure occurs with a reduction in positions, the school board "must select among those properly certified to fill mandated administrative positions." Tenure then requires that those certified for and formerly occupying mandated administrative positions for which no mandated administrative position is available must be reassigned to teaching positions within the district for which they are certified." Since this was done in this case, the appellate court found nothing arbitrary or discriminatory about the board's action, and affirmed the decision of the trial court.

Tennessee

City of Knoxville Board of Education v. Markelonis
460 S.W.2d 362
Court of Appeals of Tennessee, Eastern Section, October 10, 1969. Certiorari denied, Supreme Court of Tennessee, January 5, 1970.

The board of education of the city of Knoxville appealed from the trial court order requiring it to reinstate a physical education teacher. It specifically charged that the trial court was in error in holding that the notice sent to the teacher was insufficient to apprise him of the charges against him and that the court was in error in holding that the board acted arbitrarily and illegally in discharging the teacher.

A city ordinance provides that charges against a teacher must be in writing but that no charge shall ever be dismissed because lacking in form. The ordinance also states that no charge shall ever be dismissed because of insufficiency, but the charges shall state the facts on which they are

based and give the time, place, and factual nature in detail. However, after a hearing at which the employee testifies, he can make an affidavit that he was misled to his prejudice because of the insufficiency of the charge and that he believes that he can obtain sufficient testimony to have the charge dismissed.

Pursuant to the ordinance, the superintendent sent the teacher a letter containing notice of two charges against him. The first charge was that he was arrested for burglary, and the second, that he was suffering from "bodily infirmity or disease" of such nature as to endanger the health of those with whom he must come in contact, or which renders him unfit for work. Following a hearing before the superintendent the teacher was dismissed. This decision was subsequently affirmed by the board of education.

The trial court found that the teacher could make no defense to the first charge since admittedly he was arrested and that there was no evidence to sustain the second charge except hearsay testimony. Accordingly, the trial court found that the dismissal was based at least in part on arbitrary and, therefore, illegal action, and ordered the teacher reinstated. The appellate court agreed with this holding but did consider the charges themselves.

The teacher had been arrested for allegedly burglarizing a women's clothing store and later confined for three weeks to a state hospital for psychiatric treatment. However, the burglary charge was dismissed without trial. No medical testimony was introduced before the school superintendent, and the lay testimony available as to the teacher's condition indicated that he was now of sound mind and capable of discharging his duties. Commenting on the sufficiency of the language in the notice of charges, and noting that there was a difference between being arrested and being found guilty, the appellate court said that it would have been impossible for the teacher to know whether the superintendent considered that for a teacher merely to have been arrested was unprofessional conduct. The appellate court also found questions raised as to the constitutionality of the ordinance. It declined to hold that the legal sufficiency of the notice was saved by the ordinance provision allowing the accused after a hearing to make an affidavit that he has been misled. However, this right, the court pointed out, is coupled with the necessity that the accused "can obtain sufficient testimony to cause a dismissal of the charge." This, the court said, presupposes that the board still has an open mind and that the accused may be fortunate enough to have access to additional evidence. If there is no such evidence, the right to a fair trial after due notice is lost.

The judgment of the trial court ordering the teacher reinstated was affirmed. Also affirmed was the holding of the trial court that the city could still proceed against the teacher after instituting a new proceeding before the superintendent.

McCoy v. McConnell
461 S.W.2d 948
Supreme Court of Tennessee,
December 21, 1970.

A principal appealed from the decision of the trial court in favor of the Hamilton County school board. During the 1968-69 school year the principal had been transferred to the position of principal in another school at the same pay. He wrote to the board of education, demanding a copy of any charges against him and a hearing on the same. The board replied that there were no charges against him and that he was being transferred in accordance with the state tenure law that provided for transfers providing there was no reduction in rank or pay.

The appellate court adopted and affirmed the opinion of the trial court, which held that the transfer was not a demotion and was not a violation of the state tenure law. Rejected by the court was the argument of the principal that although his pay was technically the same as previously, since his transfer was effective as of the new or 1969-70 fall term and his successor may or may not have been given an increase over what he had earned, this amounts to a reduction. The court said this argument was untenable in that the tenure law did not purport to control successor salaries or base any current or present right on successor rights.

Potts v. Gibson
469 S.W.2d 130
Supreme Court of Tennessee,
June 21, 1971.

A principal with tenure challenged the action of the board of education of Cumberland County transferring him from principal of a high school to principal of an elementary school at a reduction in salary. The principal alleged that this was in effect a dismissal entitling him to notice of a hearing before the board. The board conceded that the principal was entitled to a hearing after notice but maintained that ample notice was given.

After a full hearing, the trial court dismissed the principal's complaint on the basis of a finding that the evidence sustained the board's finding of

incompetence and neglect of duty. The principal then appealed.

The principal had served in the high school for a number of years. The board opposed renewing his contract for the 1970-71 school year and gave him an opportunity to voluntarily relinquish the position. After considering the matter, the principal requested a board hearing. The superintendent then sent in letter form the charges that would be heard by the board. They included specific charges under the headings of poor public relations, poor management of high school funds, and a "permissive" attitude that resulted in discipline and school maintenance problems. Following the hearing at which some of the board members appeared as witnessess, the board ordered the transfer of the principal to the elementary school.

On appeal the higher court first dealt with the adequacy of the notice. At the outset, the court noted that Tennessee case law recognizes the right of a tenure teacher to notice of a board hearing before being transferred to a position of lesser responsibility and reduced pay. The applicable statute requires that the charges against the employee must be made in writing "specifically stating the offenses which are charged." The appellate court found that the letter to the principal set forth with considerable particularity the nature of the complaints and that this was followed by a later clarifying letter to the principal stating that the board considered these charges to be tantamount to a charge of incompetence and neglect of duty. Considering this in conjunction with the later full hearing before the trial court, the appellate court found the complaint of insufficiency of notice was reduced "to a bare technicality devoid of substance."

The appellate court also found no merit in the principal's contention that the proof at the board hearing went beyond the notice. On the merits, the trial court had found that the principal was given a full and fair hearing before the board and had found the evidence "heavily in favor" of the board's findings of neglect of duty and incompetence in the exercise of executive authority. The appellate court said that the conditions in the high school described by the trial court were "so long continued, so flagrant and so open and obvious that to say the principal was unaware of them would at the same time necessitate a finding of gross negligence or indifference to the good order of the school." Consequently, it could not be said that evidence preponderated against the trial court findings and conclusions.

The last argument of the principal, that the entire proceeding should be reversed because the members of the board appeared as witnesses at the board hearing to testify in favor of the transfer and then sat in judgment on their own testimony was also rejected by the appellate court. Although the appellate court found that this practice does not commend itself as best suited to ascertaining truth and justice, the findings and conclusions of the board could not be upset for this reason absent a showing of a bias or prejudice, which was not evidenced. Accordingly, the decision of the trial court against the principal was affirmed.

Vermont

Petition of Davenport
283 A.2d 452
Supreme Court of Vermont, Washington,
October 5, 1971.

Three high-school teachers sought review of the action of the officials of the Hartford School District in suspending and subsequently dismissing them. The difficulties began on May 7, 1970, when there was a student walkout and demonstration at the high school during school hours. As a consequence of this episode, the three teachers were suspended for noncompliance with their contracts. The notice to two teachers stated that they were being suspended for failure to attend to duties and carry out reasonable orders of the principal. The third teacher was suspended for conduct unbecoming a teacher. All three requested specification of the charges and a public hearing. The hearings were set but were not held as scheduled because the teachers applied for a federal court injunction to enjoin further proceedings. The court relief was withheld pending the school-board hearing. After the hearings were conducted, the board made written findings of fact and concluded that all three should be dismissed. The teachers then petitioned for a court review.

All three teachers complained that they had been denied an impartial hearing, but no actual prejudice was shown or claimed. They claimed that the board's participation in the suspension deprived them of a fair hearing, thereby denying them due process. In rejecting this claim, the court said prior involvement in the subject matter alone would not work a judicial disqualification. In this instance, however, upon examination of the hearing transcript, the court found no indication of bias to preclude the board from conducting an impartial hearing. The court then turned to the question of whether the statute governing the dismissal of the teachers infringed upon their First Amendment rights.

In the case of the teacher dismissed for unbecoming conduct, the charges were that she solicited signatures for a petition from faculty and students, and that the substance of the petition was altered after the signatures were procured. It was also asserted that the teacher made inconsistent and untrue statements concerning her participation in the procurement of the petition, used the copying machine without authorization, neglected her teaching duties on the day of the protest, and erroneously informed teachers and students that she had been fired. The board found against the teacher on all of the charges except the unauthorized use of the copying machine. The core of the charges was the teacher's involvement in the petition seeking permission from the school board for released time for a symposium or class discussion to protest the invasion of Cambodia. Also, the petition apparently requested that students from Dartmouth College be permitted to participate in the program. The petition was denied by the school board, but before the teacher was informed of this, the principal gave permission for three Dartmouth students to engage in discussion during the teacher's class. It appeared from the transcript that when the class was over, the teacher was summoned to a meeting with the principal at which she was informed that the petition had been denied by the board, but she was not told of any pending disciplinary action against her. The charge of neglect of duty arose out of her absence from the classroom for this meeting even though her class periods were covered by other teachers.

The court found it abundantly clear that the teacher's involvement with the petition was the root of the disciplinary action against the teacher. The court noted that the right to petition the government for redress of grievances is guaranteed in the Bill of Rights and that "[f]undamental freedom thus protected cannot be stifled in the name of statutory language that affords no guidance against the conduct condemned." The court concluded that the term "conduct unbecoming a teacher" was imprecise and apparently used to cover disqualifying conduct not otherwise specified in the statute. The court held this would be permissible for serious misconduct unprotected by constitutional safeguards but that the conduct of which the teacher was accused did not reach such dimensions. "There is nothing to indicate the conduct charged against this teacher collided with the school regulations nor the rights of other students or teachers." Since the teacher's conduct related inextricably to the exercise of the teacher's right of petition, the school board was without authority to direct her dismissal for such participation. Therefore, the court ordered that the dismissal of this teacher be vacated.

The record from the hearing regarding the other two teachers indicated that the third teacher's confrontation with the principal generated widespread rumors throughout the school that she had been or would be fired. Although efforts were made over the public address system by the teacher and the principal to thwart the rumors and avert a demonstration, a student walkout in protest against the dismissal took place. The two teachers in this case left their classrooms and participated in the protest, and refused to return to their classes when requested to do so by the principal. As a result of the demonstration, the principal called a faculty meeting for that afternoon but the two did not attend. A further charge of insubordination was made against one of the two teachers for refusing to keep his study hall under control when requested to do so by the principal. The court concluded that the findings of the board were founded on evidence. The teachers complained that the board's decision to discharge them for failure to carry out orders of the board and the school superintendent cannot be sustained since the orders were given by the principal and not the school board. The court found this argument unpersuasive since the board could delegate authority to subordinate school officials. In the emergency situation that prevailed at the high school, the court said, the orders of the principal were quite reasonable and in keeping with the interests of orderly conduct of the school. There was neither time nor occasion to refer the orders to the superintendent and the school board for approval. The court did not find the actions of these two teachers to be constitutionally protected activity nor did it find that the statutory violation with which the teachers were charged, that of failure to attend to duties or carry out reasonable orders, was ambiguous or that there was a danger that its application would have a chilling effect upon the exercise of First Amendment rights. The relief sought by these two teachers was denied and their dismissals upheld.

Washington

Reagan v. Board of Directors, Republic School District 309
480 P.2d 807
Court of Appeals of Washington, Division 3,
February 16, 1971.

A teacher appealed from the trial court decision affirming the decision of nonrenewal of his contract by the school board. On March 29, 1968,

the teacher was notified in writing of the decision not to renew his contract and the charges against him. This was accomplished by placing the notice in his message box at school. On April 7, 1968, within the 10 days required by statute, the teacher submitted a written request for a hearing. It was agreed by telephone to hold this hearing following the regular board meeting on April 11, and the teacher received written notice to this effect on April 10. The hearing was open; the teacher was present with notes, a prepared statement, a tape recorder, and several friends. It appeared that the hearing was noisy and somewhat disorderly. Following the hearing the school board determined that the charges had been proved and that they constituted sufficient cause for discharge. The teacher then appealed to the trial court as provided for by law.

Prior to the hearing before the trial court the teacher sought a summary judgment declaring his contract renewed by reason of the failure of the school district to give him proper notice of the nonrenewal and of the board hearing. The trial court ruled that the teacher waived his right to be given notice in the manner required by statute. On appeal the teacher contended that this was error.

The controlling statute provides that the teacher whose contract is not to be renewed, be notified by certified or registered mail, or personally, or by leaving a copy of the notice with some person at his residence. The statute also provides that a teacher receive at least three days' prior written notice of the date, time, and place of the hearing. Failure to provide proper notice entitles the teacher to a conclusive presumption that he is re-employed for the next school year.

The appellate court noted that the Washington rule of waiver of a right or privilege to which a person is legally entitled is "the intentional or voluntary relinquishment of a known right, or such conduct as warrants an inference of the relinquishment of such right." In this instance the appellate court observed that the teacher had five years' teaching experience and is presumed to know the law relating to his contract of employment. Additionally, there was evidence that the teacher knew of the statutory requirement that he request a hearing within 10 days of receiving the nonrenewal notice, knew of his right to a hearing, and knew of his right to be represented by counsel. From this, the appellate court said it could be reasonably inferred that he also had knowledge of the remaining provisions of the law relating to the manner in which the board was required to give him notice. On appeal the teacher also complained that he was unable to obtain counsel at the hearing because his lawyer was out of town. The appellate court noted that at the hearing the teacher did not say that he wanted or needed a lawyer nor did he ask for a continuance until he could obtain a lawyer. Under all of these circumstances the appellate court found substantial evidence to warrant an inference that the teacher's waiver was an intentional and voluntary relinquishment of a known right or one of which he had constructive knowledge.

The teacher's remaining assignments of error were directed to: (a) the trial court finding that there was evidence before the school board from which it could have arrived at its decision; (b) the conclusion of the trial court that the decision of the board was not shown to be arbitrary and capricious; (c) the conclusion that the court may not substitute its judgment for that of the board if there was any evidence upon which the board could have based its decision. The teacher contended that he was entitled to the trial court's independent evaluation of the evidence and that the standard to be applied was not whether there was any evidence upon which the board could base its decision but whether the board had proved and established the cause or causes for nonrenewal.

The appellate court agreed with the teacher's interpretation of the standard to be applied by the trial court since the statute requires a *de novo* hearing before the trial court of an appeal by the teacher from the school board's decision. The appellate court held that this *de novo* hearing entails full consideration of the case anew to be heard by the trial court in the same manner as though it were an original proceeding in that court. In effect, the trial court is substituted for the board and redecides the case. The appellate court stated that the question before the trial court for determination was not whether the school-board action was arbitrary and capricious, measured by the test of whether there was *any* evidence to support it. Rather, the question presented was whether the school board met the burden of proving and establishing, by competent evidence, the cause or causes specified in the notice of nonrenewal. In making such determination, the appellate court continued, the trial court was required to exercise its own judgment, based on the evidence presented. The decision of the trial court was reversed and remanded.

Roberge v. Hoquiam School District No. 28
490 P.2d 121
Court of Appeals of Washington, Division 2,
October 12, 1971.

An elementary-school teacher was employed for the 1967-68 school year, and his contract for

the 1968-69 school year already had been renewed when he was notified on May 2, 1968, that his employment was immediately terminated and his contract for the next school year cancelled. The reasons given were insubordination; unauthorized corporal punishment, and unprofessional conduct.

At this point the school district had not properly discharged the teacher under state law. However, the teacher consulted an attorney who requested a hearing before the school board. The date for the hearing was set but later postponed because the teacher had engaged another attorney. Prior to the second date set for the hearing, negotiations between the teacher's attorney and the school board attorney took place in an attempt to reach a settlement. During the negotiations the school board offered to pay the teacher the remainder of his 1967-68 salary, drop all charges of unprofessional conduct, and cancel the hearing. In return, the teacher was to resign, request the cancellation of his 1968-69 contract, and waive any contract renewal or other employment rights. The agreement was put into writing and signed by the teacher on May 23, 1968. He resigned and the hearing was cancelled.

In July 1968, the teacher filed a complaint in court charging that he had been suspended from his teaching position on "false charges" and as a result had suffered damages by way of mental anguish, loss of reputation, and alienation of the students. The trial court ruled that the principal issue was whether or not the teacher had resigned voluntarily and was therefore precluded from bringing suit. After finding no evidence to indicate that the teacher "was coerced or compelled into signing his resignation of May 23, 1968," or that he was induced into signing it by false pretenses, the trial court dismissed the action. The appellate court held that the record supported these findings and accordingly affirmed the dismissal of the teacher's suit.

Wisconsin

State ex rel. Farley v. Board of School Directors of the City of Milwaukee
183 N.W.2d 148
Supreme Court of Wisconsin,
February 5, 1971.

Plaintiff had been a teacher in the Milwaukee school system for many years. In 1960, he was appointed to an administrative position. Thereafter, he served in various administrative positions, finally serving as director of the department of federal projects. In June 1968, this position was discontinued, but its functions continued to exist under a new designation. In August 1968, the teacher was notified that he was being assigned as an elementary-school teacher for the 1968-69 school year at a considerable reduction in salary over what he received as an administrator. Upon notification of his new assignment, the teacher filed a "complaint initiation form." When no hearing was scheduled and no notice of action was received on the complaint, the teacher initiated the court proceeding seeking to compel the board to reinstate him in his administrative position. The day after suit was filed, the teacher was notified that his complaint had been rejected by school officials because "there is no tenure to any position in the administrative staff of the Superintendent." The requested judicial relief was granted and later vacated by the lower court. It is from the latter decision that the teacher appealed.

The first question considered on appeal was whether the teacher acquired tenure as an administrator by virtue of rules adopted by the board. The rules provided that an administrative or supervisory employee who had acquired tenure as a teacher, assistant to a principal, a vice-principal or a principal, and was later promoted to an administrative position would retain the tenure that he had previously obtained. If an administrative or supervisory employee did not have tenure in another position prior to being appointed to the administrative staff, he would, after three years' satisfactory service, obtain tenure in the school system but not in any particular position on the administrative or supervisory staffs. The teacher argued that since the restriction in the rules as to tenure in the system but not in any specific staff position applied only to those acquiring tenure after appointment, this evidenced an intention to grant to employees who acquired tenure prior to appointment to administrative and supervisory positions, tenure in those positions.

The trial court had found that it was not the intent of the section to establish tenure in any specific staff position. In upholding this conclusion, the appellate court said that the teacher had not stated a cause of action because the section in question did not purport to create tenure in any particular administrative position.

The next argument of the teacher was that he had acquired tenure under the city civil service statute. The statute in question exempted certain school-board employees from coverage but did not mention the position held by the teacher. The teacher argued that since the position was not mentioned, it was intended that it be covered under civil service and that he could not be removed

without a hearing. The appellate court disagreed with this contention noting that civil service employees must be is classified and that the teacher had not alleged facts tending to establish that his position was classified as a civil service position before he may be allowed to claim the benefits under the civil service statute. It seemed to the court that the opposite was true in view of the fact that the teacher had first been appointed to his position by the superintendent of schools with the approval of the board of education pursuant to specific statutory authority.

Finally the teacher contended that his reassignment entitled him to a hearing. In view of the finding that the teacher had no tenure in an administrative position, the court ruled that he was not entitled to a hearing when he was not reassigned to that position. Since the teacher had tenure rights as a teacher, he could not claim tenure rights to an administrative position. The judgment of the trial court dismissing the complaint of the teacher was affirmed.

Wyoming

Monahan v. Board of Trustees of Elementary School District No. 9, County of Fremont
486 P.2d 235
Supreme Court of Wyoming,
July 2, 1971.

The contract of a continuing contract teacher was terminated at the end of the school year by the board of education. Claiming that he had tenure and that he had not been given a fair and impartial hearing, the teacher sought court review of the termination. The trial court upheld the action of the board and the teacher appealed.

It was the position of the school board that a continuing contract teacher did not have tenure under state law. A continuing contract teacher is one who has served three years in a district and has been reappointed for the fourth year. The statute setting out that employment of a continuing contract teacher continues from year to year also differentiates between dismissal and termination. Since grounds for dismissal only are listed in the statute, the board reasoned that termination could be at will without regard to grounds. The appellate court refused to accept this theory, holding that there must be a hearing on the termination of the contract of a continuing contract teacher and there must be not only good cause for termination but substantial evidence to show that there was good cause. The court interpreted the Wyoming Teachers Employment Act, the statute here involved, as giving tenure to a continuing contract teacher.

The appellate court then considered the contention of the teacher that he was not afforded a fair and impartial hearing. It appeared that the teacher had been notified on March 15, 1969, that he was being terminated. A few days later he requested a hearing which was held on April 10, 1969. The appellate court found it clear from the record as a whole and from admissions of the board's attorney that the teacher did not have a bona fide hearing to determine if there was just cause for his termination. The teacher's hearing the court said, "was nothing more than an exercise engaged in for the sole purpose of making a record which could make legal and justifiable the decision which the board had made prior to the hearing."

In fact, the statement was made at the hearing that it was deplorable that the legislature had enacted a tenure statute. The record also disclosed that the school board attorney acted as the presiding officer at the hearing. The attorney drew up the statement of charges, acted as the prosecutor, acted as hearing officer, ruled on objections, argued with the teacher's counsel on his objections, interrogated witnesses, ruled on his own objections, and sat with the board when it made its final decision. Rather than point to specific instances concerning the teacher's complaint about hearing and procedures utilized, the appellate court found it sufficient to quote a portion of the trial court opinion referring to the procedures at the hearing as "clumsy and irregular."

The final comment of the court concerned the failure of the school board to adopt rules of practice and to file them as required by law. In some instances where this failure was not prejudicial or fatal, failure to adopt rules would not mandate reversal. However, here the school board had not shown that the failure to have rules of procedures was not prejudicial to the teacher. Without deciding if the grounds for termination were sufficient cause, the appellate court reversed the board decision for failure to provide the teacher with a fair and impartial hearing, and remanded the case to the trial court for further proceedings consistent with this opinion.

Nontenure Teachers

THE FOLLOWING cases involved teachers who were on probationary status or teachers in states without tenure protection.

Alabama

Fluker v. Alabama State Board of Education
441 F.2d 201
United States Court of Appeals, Fifth Circuit,
March 31, 1971.

Two nontenure faculty members at Alabama State University brought suit under the federal civil rights act alleging that their employment was terminated because of their activities, associations, and expressions of opinions in violation of the First and Fourteenth Amendments. They also alleged that they had been given no notice of the charges against them or an opportunity for a hearing. The district court directed the University to give them formal notice of the charges and a hearing, and reserved the power to later evaluate the adequacy of the university procedures and to determine if the teachers' substantive constitutional rights had been violated.

Pursuant to that order each of the teachers was notified by letter of the reason for his termination. One was informed that the University wished to employ a person with a doctorate degree in the history department, and the other was told that the University wished to employ a person with a master of fine arts in the art department in order to strengthen the faculties of the two departments and to comply with the standards of the Southern Association of Colleges and Schools. The letters also stated that in order to make room for the new faculty members, it was necessary to terminate one existing member in each department; and the history teacher was the only nontenured person and the last one employed in his department, and the art teacher had the least amount of training and least experience in his department. Both were also informed of a hearing on the nonrenewal of their contracts.

The hearing was before the University's Advisory Committee on Faculty Personnel. Both parties were present and represented by counsel. The testimony from both sides was devoted almost entirely to the reasons given by the University to the nonretention of the two faculty members and very little mention was made of the alleged First Amendment activities and the University's action. At the conclusion of the hearing, the committee was of the opinion that the question was whether the University had the right by law to dismiss nontenure faculty members for the reasons given, which question it did not feel competent to answer. Upon receiving this opinion from the committee the president of the University notified the two faculty members that he had been advised by counsel that the University had the right to refuse to renew the contracts of nontenured faculty for the reasons given and that they would not be reemployed. The faculty members then returned to the district court.

The district court conducted a *de novo* hearing and at its termination held that the faculty members had been accorded procedural due process and that there was a factual basis for the refusal of the University to re-employ them. The evidence convinced the court that the action of the University was altruistically motivated to strengthen the faculty and based on educational and administratively sound principles and reasons. Based on these findings and conclusions, the district court denied relief to the teachers.

On appeal, the teachers contended that the district court had erred in placing the burden of proof on them to show that their First Amendment rights had been violated. The appellate court said that "the law in this Circuit is crystal clear that a non-tenured teacher alleging that he has been dismissed for constitutionally impermissible reasons 'must bear the burden . . . of proving that a wrong has been done by the collegiate action in not rehiring him.' " The teachers then argued that even if they initially had the burden of proof, it shifted to the school authorities once they had made a "sufficient circumstantial showing." The court disagreed, noting that under the law of the Circuit, neither the burden of going forward nor the burden of proof shifts to the state until it has been established that the teacher was dismissed for the exercise of his constitutional rights.

The teachers also raised procedural issues including the lack of timely notice and the failure of the University to put them on notice of standards for continued employment. With regard to timely notice, the court said that the law was complied with in that they were notified by December 15, and that the subsequent district court injunction did not alter the fact that they were notified of the intended termination of their employment. As to the second point, the notice of standards for continued employment, the appellate court said there was nothing in the decisions of the Circuit to require the procedure suggested by the teachers. The

final procedural complaint was the alleged bias of the committee members and the lack of a procedure to challenge that bias and other alleged defects. The district court declined to rule on this allegation because the teachers had received a full court hearing. The appellate court upheld this ruling.

The teachers also raised two factual contentions on appeal. First, that the facts did not support the University's stated reason for nonrenewal. The court disagreed with this contention. It concluded that the record amply supported the lower court's findings that the action taken by the University was "altruistically motivated" to strengthen its faculty in order to meet requirements and that it was attempting to hire persons with doctorates in as many departments as possible. The court also found no evidence to support the contentions of the teachers that they were fired for their anti-administration activities. Concluding that the testimony and evidence supported the findings of the district court, the appellate court affirmed its decision.

Arizona

Kaufman v. Pima Junior College Governing Board
484 P.2d 244
Court of Appeals of Arizona, Division 2,
May 4, 1971.

The former dean of administration of Pima Junior College had been hired there in early 1968 for that year and then rehired for fiscal 1969-70. The board also gave a tentative commitment for fiscal 1970-71. However, no written contracts were ever issued. His employment proceeded without incident until September 16, 1969, at which time he was requested to submit his resignation. He refused and did not leave until he was locked out of his office and his salary stopped. Suit was then brought to force the college to reinstate him to his position for the balance of the 1969-70 fiscal year and to recognize his contract for the 1970-71 fiscal year. He also sought to compel the college to issue him a statement of reasons for dismissal for the 1970-71 fiscal year and a hearing on those reasons. The trial court dismissed his petition and the administrator appealed.

The first claim of the administrator on appeal was that his dismissal was in violation of the state teacher tenure act. The appellate court noted that this act refers to two types of teachers, tenured and probationary, but that the administrator was never hired in a teaching capacity of any kind. Therefore, the law did not apply to him. The court said further that even assuming that he was a probationary teacher, the law did not apply to junior colleges organized under the State-County Junior College Program.

The next contention of the administrator was that the board of the junior college failed to comply with the state board of directors of junior colleges standards on tenure. These standards required the governing board of junior colleges to establish a policy to protect staff members from unreasonable dismissal, including a written statement of reasons for dismissal. On this issue, the college officials argued that the state board of directors for junior colleges had no governing power over them and no power to impose this standard of tenure. The court found that the powers of the state board were broad enough to impose the standard. The college then argued that it had the absolute right to discharge an employee. In rejecting this argument, the appellate court noted that state law provides that a district board shall have the power to "remove any officer or employee when in its judgment the interests of education in the state so require." Thus, the court said, the district board is given the authority to use and exercise its *judgment* and this means "discretion exercised, not arbitrarily or willfully, but with regard to what is right and equitable under the circumstances and the law." The court was of the opinion that the state board standards of tenure were compatible with the state law.

The administrator had complained that he was not given a written statement of reasons for his discharge nor a hearing on those reasons. He sought a writ of mandamus to force the college officials to provide these. The appellate court held that his action was premature since inherent in a writ of mandamus is that it is issued to force performance of a ministerial duty and the person seeking the writ must first demand performance of that duty. The court believed that inherent in the state board policy of standards on tenure was the right to a hearing before the junior college board but that the hearing must be requested and is not automatic. Since there was no evidence that the administrator had ever requested the hearing, the writ could not be issued. And since there was testimony that the reasons for dismissal were given orally, the court said that the administrator should have requested the written reasons prior to bringing suit.

In rejecting the final argument of the teacher that he had a common law right to a hearing, the court stated that the cases cited by the administrator to support his contentions applied to teachers and he was not a teacher. Because the appellate court was of the belief that the suit was premature,

the lower court dismissal of the petition was affirmed.

Arkansas

Cooley v. Board of Education of Forrest City School District, Forrest City, Arkansas
327 F.Supp. 454
United States District Court, E.D. Arkansas, E.D., April 27, 1971; reversed on appeal, 453 F.2d. 282 U.S. Circuit Court of Appeals for the Eighth Circuit, January 6, 1972.

A black junior high-school teacher sued the school board, seeking a declaratory judgment as to the legal rights and relationship of the parties, an injunction to reinstate him, and damages for lost earnings. The teacher had been employed in the district schools since 1957 as a social studies teacher. He was also a minister in a local church and very active in various local civil rights groups.

In March 1969, his contract was terminated by the school board upon the recommendation of the superintendent. The basis was his failure to cooperate, fostering of organizations in the classroom sponsored by outside agencies, refusing to comply with the requirements, rules, recommendations and guidelines of the school district, and other offenses. The question before the court was whether his termination was for the reasons alleged by the school board or as the teacher alleged because of his activity as a civil rights proponent and his continued activity outside the classroom in the civil rights field. If his termination was for the reasons he had alleged, the teacher was entitled to reinstatement and damages.

In reviewing the evidence, the court found that there had been continuous difficulty between the teacher and the superintendent and the school board for over two years. The teacher's civil rights activity was not limited to his statements, conferences, and activities in his church and outside the school, but had become "part and parcel of his activity in the classroom and on the school grounds." Also, the teacher was a probation officer of the state court and insisted on wearing his badge of authority in the classroom despite the superintendent's orders to the contrary. The teacher and the superintendent had had numerous conferences over the preceding two years, and although the evidence was in conflict, the court found that the teacher "continued to conduct organizational meetings in the classroom with outside adult citizens and representatives of agencies contrary to the regulations and continued warnings of the superintendent, which interfered continuously with the classroom activity and culminated in frustration in the classroom and on the campus." The court concluded from all of the testimony that regardless of the teacher's determination in his field, there was no justification for carrying his deep feeling to the classroom and to the point of defiance and insubordination while engaged in his duties as a classroom teacher.

Finding that the termination of the teacher was for good cause due largely as the result of the teacher's own actions and not as a result of infringement of his constitutional rights, the court declined to order his reinstatement and dismissed the complaint.

NOTE: This decision was set aside by the U.S. Circuit Court of Appeals, Eighth Circuit, on January 6, 1972 (453 F.2d 282), on the grounds that the teacher was deprived of procedural due process in that he was summarily dismissed in mid-term without notice of reasons for his discharge and a reasonable opportunity to explore fully why the mid-term discharge was appropriate. The appellate court held that absent a countervailing state interest of overriding significance (which the court found was not present in this case), a teacher dismissed for cause during the school year is entitled constitutionally to a notice of reasons for the dismissal and a reasonable opportunity for a hearing at which the teacher is able to give testimony and confront and question adverse witnesses. In the opinion of the court, procedural due process is necessary because "a mid-year discharge increases the economic hardship and renders even greater the likelihood that subsequent employment opportunities will be significantly circumscribed."

The appellate court ruled that the teacher was entitled to a declaration that his discharge was constitutionally invalid; that he was entitled to reinstatement to his former position, and if that position was unavailable, to a comparable position in the school system; and to a determination by the district court as to whether he was damaged by his dismissal and if so, the amount of the damage and as to whether he was entitled to attorney's fees and if so, the amount thereof.

California

Auerbach v. Trustees of California State Colleges
330 F.Supp. 808
United States District Court, C.D. California, August 18, 1971.

A professor at San Fernando Valley State College sued the president of the college and state

college officials to enjoin the decision of the president not to renew his contract. During his second year of employment the professor was notified that his contract would not be renewed for the 1971-72 academic year. The decision not to renew was made following a series of negative recommendations from the various committees that participate in the consultative process with regard to reappointment of probationary employees.

The professor attempted to obtain a statement of the reasons for the action and a hearing on those reasons. There was a grievance procedure open to the professor which he did not utilize because of the school officials' refusal to provide him with reasons for his termination and the inability of the grievance procedure to assure that he would be able to secure these reasons by filing a grievance.

The refusal of the college officials to supply the reasons was based in part on the applicable rules and regulations which only required that a nontenured employee in his second year be notified prior to December 1, of his non-reappointment for the next school year.

The court held that the refusal of the college officials under color of state law to supply the professor with the reasons for his non-retention and with a fair and impartial hearing whereat he could seek to establish through evidence that the reasons given for his dismissal were constitutionally impermissible, untrue, or otherwise inappropriate, was "arbitrary and capricious, and constituted a denial of due process to plaintiff within the meaning of the Fourteenth Amendment." A permanent injunction was issued directing the college officials to supply the professor with a statement of reasons for the decision not to reappoint him and accord him tenure status and to provide him with a hearing. The court retained jurisdiction of the case.

Governing Board of Nicasio School District of Marin County v. Brennan
95 Cal.Rptr. 712
Court of Appeal of California, First District, Division 3, June 24, 1971.

The governing board of the school district filed a complaint against a teacher seeking her dismissal, and the teacher sought a writ of mandamus to force the board to re-employ her for the next school year. The trial court entered judgment for the board and the teacher appealed.

During the 1967-68 school year, the teacher was a probationary employee in the school district. On September 27, 1967, she executed an affidavit in support of another person convicted of possession of marijuana and related offenses. The affidavit set out that the teacher had long used marijuana, almost daily with only beneficial results. The affidavit immediately received publicity, and the trial court found that the teacher's students soon knew of its contents. On October 11, 1967, the board adopted a resolution to suspend the teacher and after she demanded a hearing, filed a complaint to dismiss her. On March 14, 1968, while the complaint was still pending, the school district served notice on the teacher that she would not be re-employed for the following year.

The teacher contended that the "immoral conduct" as applied in this case was unconstitutionally vague. The court cited the California Supreme Court decision, *Morrison v. State Board of Education* (461 P.2d 375) wherein the court said: "Terms such as immoral or unprofessional conduct or moral turpitude stretch over so wide a range that they embrace an unlimited area of conduct. In using them the legislature surely did not mean to endow the employing agency with the power to dismiss any employee whose personal, private conduct incurred its disapproval. Hence the courts have consistently related the terms to the issue of whether, when applied to the performance of the employee on the job, the employee has disqualified himself."

Thus, the court said, the term "immoral conduct" is not unconstitutional in itself, and if there is evidence of unfitness to teach, it is not unconstitutional as applied to the instant case. The trial court had found as fact that in her affidavit the teacher did not merely advocate that the laws prohibiting marijuana be changed but stated that she habitually violated these laws. No evidence was offered as to the effect this admission had upon the teacher's pupils since she had been suspended so soon after the contents of the affidavit became known. However, there was evidence offered on the likely effect of the teacher's conduct on her pupils. While there was a conflict of evidence on this point, if there was substantial evidence to support the trial court finding, the appellate court would be bound by that finding. The appellate court ruled that there was substantial evidence.

The teacher also contended that the signing of the affidavit was constitutionally protected free speech. The appellate court did not agree, noting again that the teacher had not merely advocated changing the law but admitted violation of the law, and then publicly so stated this fact in a way that would reach and affect her pupils. The court said the affidavit was not the basis of the action taken by the board, but merely evidence of her competence or incompetence to teach. To this extent, the statement was unprotected by the Constitution.

The final contention of the teacher was that since the school board had previously suspended her it could not then institute proceedings to refuse to re-employ her. The court said that school district did not contest the teacher's right to appeal, and her request for a writ of mandate would have been granted if the school district had no jurisdiction to institute the proceedings against the teacher or if there was no substantial evidence to support the finding of cause. However, finding both jurisdiction and substantial evidence, the appellate court affirmed the decision of the trial court.

Toney v. Reagan
326 F.Supp. 1093
United States District Court, N.D. California,
March 29, 1971; as amended April 28, 1971.

Six probationary faculty members at Fresno State College brought suit under the federal civil rights act against officials of the state college system seeking declaratory and injunctive relief. Five had been notified that they would not be offered appointments for the 1971-72 school year, the sixth, while reappointed, was notified that his would be a terminal appointment. A non-terminal reappointment for the fifth successive year is required for tenure.

The teachers first argued that although they did not have formal tenure, they did have an "expectancy of reappointment" and therefore were entitled to the same notice and hearing as if they were tenured. The court disagreed with this argument, saying that the "expectancy of reappointment" concept is applicable only in those instances where the institution does not have a formal tenure system. Accordingly, the court held that the rights of these teachers must be determined according to due process rules applicable to nontenured faculty, as distinguished from tenured faculty.

Although California law does not require a hearing for nontenure teachers, Executive Order 112 provides for a grievance procedure for nontenured teachers complaining about nonrenewal of appointment. The teachers had initiated their grievance procedure under this order, but shortly thereafter, prior to any action being taken, filed this court suit alleging that non-reappointment was for constitutionally impermissible reasons, the exercise of First Amendment rights, and that the procedures provided by the order were inadequate and unconstitutional. If this last allegation was correct, the teachers would be relieved of their responsibility to exhaust their administrative remedies prior to bringing suit.

Thus, the basic question before the court was the adequacy of the grievance procedure set out in Executive Order 112. The order provided that the grievant initiate the proceedings by giving written notice to the president of the college who then selects, by lot, a panel of three members of the tenured faculty. Each side is permitted to exercise two peremptory challenges and unlimited challenges for cause. The panel first determines whether a hearing is required, and if so, notice is then given of the time and place. A tape recording is made of the hearing. The grievant has the burden of proof. The hearing is not open to the public, and is not conducted according to technical rules relating to evidence and witnesses. The findings and recommendations of the panel are confidential, and the president of the college is bound by those findings except in rare instances, in which case he is required to state in detail his reasons for an opposite result. Where the president does not concur in the result of the panel, an appeal to the chancellor of the system is provided.

The first complaint of the teachers was that the procedures were inadequate because they were not in any sense a "trial." In response, the court said that procedural due process does not require a formal "trial" conducted under judicially described rules of evidence. Next the teachers complained that they were not permitted to be represented by an attorney. The court did not find presence of counsel to be an essential ingredient of a fair hearing. The teachers also complained that the procedure left the decision up to the very person who had dismissed them originally, the college president. On this point, the court stated first that the president did not fire or dismiss any of the teachers, he merely decided not to renew their annual contracts. Referring to the grievance procedure, the court noted that the president was bound by the decision of the panel except in "rare instances," in which case a further appeal was possible, so that the final decision was not his alone. As to the teachers' contention that they were not given the reasons for nonrenewal, the court noted that attached to their complaint were the rating reports and recommendations of their department and deans indicating the reasons for nonrenewal.

The additional complaints of the teachers relating to the confidentiality of the transcript, the fact that the hearings were closed to the public, and the number of challenges permitted to panel members were found unpersuasive by the court. Accordingly, the court held that the grievance pro-

cedure was fair and adequate. The preliminary injunction sought by the teachers was denied.

Colorado

Colorado Civil Rights Commission v. State, School District No. 1, Bent County
488 P.2d 83
Colorado Court of Appeals, Division 1,
August 10, 1971.

A probationary teacher filed a complaint with the state civil rights commission, charging that she had been discharged from her employment because of her Spanish-American ancestry. Prior to the end of the 1967-68 school year the teacher had been informed by her principal that she would not be recommended for re-employment for the next school year and suggested that she resign. The teacher did so and later asked that her resignation be withdrawn. When the school board refused to do so, she filed the complaint with the civil rights commission.

The commission determined that the teacher had been unlawfully discharged. The school board appealed this finding to the trial court which held that the commission did not have jurisdiction because the teacher had voluntarily resigned. The commission then appealed from that decision.

The appellate court held that the trial court erred in deciding that the commission did not have jurisdiction. While the teacher had resigned, she would not have done so if the principal had not told her that she would not be rehired. The teacher had been constructively discharged and the commission did have jurisdiction.

The appellate court then considered the question whether there was substantial evidence to support the finding of the commission that the teacher had been discharged because of her ancestry. Upon careful consideration of the entire record, the court found that the record disclosed neither direct evidence of racial discrimination nor evidence of actions by the school board from which a fair inference of such discrimination could be drawn. In fact, there was substantial evidence that a legitimate reason existed for discharge. For this reason the judgment in favor of the school board was proper and was therefore affirmed.

Delaware

Pierson v. De La Warr School District
282 A.2d 656
Court of Chancery of Delaware, New Castle,
September 23, 1971.

A nontenured high-school teacher sought a judgment against the school district, declaring that his contract had not been terminated and for a mandatory injunction directing reinstatement. During the teacher's initial year of employment he was notified that his re-employment for the 1971-72 school year would not be recommended at a forthcoming board meeting. He attended and participated in that board meeting, but a decision on his re-employment was not reached. Thereafter, on May 22, 1971, he wrote to the board requesting a hearing. In response he received notification that the board had met on May 26, and decided not to proceed with his year-end termination. Instead, his services would be terminated during the school year for incompetency and neglect of duty, and he would be suspended immediately. His request for a hearing was denied.

The court did not consider the teacher's constitutional arguments regarding due process, but based its decision on the two statutes applicable to the controversy. One statute provided for the termination of *any* teacher during the school year. It stated that such teacher shall have the same right to notice of the charges and a hearing and right of appeal pursuant to the procedures specified in sections 1412–1414 for termination of services at the end of the school year. Those sections by operation of another section referred to discharge of tenure teachers. It was the position of the school board that only tenure teachers have the right to notice and a hearing; this teacher was not tenured and, therefore, there was no requirement for a hearing.

The court disagreed with the school board's interpretation of the statutes, holding that *any* teacher dismissed *during* the school year, including a nontenured teacher, was entitled to the protection of the statute.

The court said that any ambiguity in the statute should be resolved in favor of a hearing for a teacher dismissed during the year, whether tenured or not, since dismissal amounts to termination of contract for cause and, "considering the circumstances, there is obviously much more potential for permanent damage to reputation and an opportunity to earn a livelihood when dismissal occurs during the year than there is when a contract is simply not renewed at the end of the year."

Finally, as to what relief would be appropriate, the court decided to grant the motion of the school board to dismiss the suit on the condition that it promptly make available to the teacher a hearing and all of the procedural rights to which he is entitled under the statute.

Florida

Johnson v. Board of Public Instruction of Collier County, Florida
241 So.2d 445
District Court of Appeal of Florida, Second District, December 4, 1970.

A nontenure, elementary-school teacher whose contract was not renewed for the 1969-70 school year brought suit against the board, seeking a declaratory judgment as to her rights to reappointment. The trial court granted the motion of the board to dismiss the teacher's complaint on the ground that she had failed to allege any facts which indicated that the board had a duty to re-employ her and the teacher appealed.

The teacher had been employed by the school system for three years. She alleged that she had fulfilled all of the requirements for tenure, namely, educational qualifications, efficiency, capabilities, character, and capacity to meet the educational requirements of the community. Also, she had been rated "above average" by her principal and by two supervisors of the school system. The teacher further alleged that despite these recommendations the superintendent failed to recommend her for continued employment and that such failure was due to arbitrary discrimination, capriciousness, unreasonable grounds, or mere personal preference by the superintendent.

The appellate court held that the complaint of the teacher contained sufficient allegations of fact, which if proved, would show that she was denied re-employment for a reason or condition which was discriminatory, capricious, or unreasonable. Therefore, the order of the trial court dismissing the teacher's complaint was reversed and the case remanded for further proceedings.

Georgia

Callaway v. Kirkland
320 F.Supp. 1135
United States District Court, N.D. Georgia, Atlanta Division, December 29, 1970.

A high-school teacher brought suit against Clayton County school officials, alleging that he was dismissed from his teaching position in violation of his constitutional rights under the First and Fourteenth Amendments. Both parties moved for summary judgment.

The teacher had been employed in the school system since September 1965. On March 17, 1970, his principal advised him by a letter that a decision on the renewal of his contract was being withheld pending further consideration. On March 19, 1970, the superintendent informed the teacher that his services were terminated as of that date for six enumerated reasons. These were telling off-color jokes and using profanity in the classroom, using *Playboy* magazine as a teaching aid, using a certain film, displaying a negative attitude, and failing to follow the set curriculum. The teacher allegedly was summoned from his classroom and instructed to remove himself and his personal belongings from the premises immediately. Subsequent to his dismissal the teacher brought this action in lieu of any appeal to local school authorities.

The court found nothing in the record to indicate that any type of meaningful notice or hearing in accord with the requirements of due process was provided to the teacher. Under the authority of *Ferguson v. Thomas,* (430 F.2d 852) the court did not believe that the case was ripe for adjudication. That case held that there should be a full development of the merits of a controversy through notice and a hearing prior to a federal court suit. Consequently, the court remanded the case to the county board of education for compliance with minimum standards of due process as described in *Ferguson,* including notice and a hearing.

Illinois

Fooden v. Board of Governors of State Colleges and Universities
268 N.E.2d 15
Supreme Court of Illinois, January 25, 1971; rehearing denied, March 31, 1971. Certiorari denied, June 29, 1972, U.S. Supreme Court (41 U.S. Law Week 3002).

While in their second year of employment at Chicago State College, two probationary assistant professors were notified in November 1968 that their contracts would not be renewed for the 1969-70 school year. The professors and the Cook County College Teachers Union sought to have the board of governors review the procedures followed in making this determination. In April 1969, the board did review the procedures and approved them. The professors then brought suit, alleging that the procedures used in notifying them and removing them from the faculty violated the governing board rules, policies, and bylaws and the faculty constitution; that the procedures used violated the terms of their individual contracts; and that they were removed in violation of their constitutional rights of free speech and due process.

The board filed a motion for summary judgment supported by an affidavit reciting the rights of probationary teachers. This was limited to notice by December 1, of any year after the first year of employment that the probationary teacher would not be continued in employment after the end of the current academic year. The affidavit also set out that only the board's bylaws, governing policies, and practices were applicable to questions involving the re-employment of probationary teachers, and the faculty constitution of Chicago State College was not binding on the board or its executive officers. The trial court found no issue of material fact and granted summary judgment in favor of the board.

The professors and the union appealed. They argued that summary judgment was improper because there were unresolved issues of fact, particularly whether the teachers were removed because of their union activities and expressions of views on public education. On the other hand, the board argued that the failure of the teachers to file a counter-affidavit estopped them from challenging for the first time on appeal the sufficiency of the board's affidavit. The board reasserted that its sole obligation to the teachers was to notify them of nonrenewal by December 1 and there was no obligation to notify them of the reasons for nonrenewal.

The appellate court concluded that summary judgment was proper because of the failure of the professors to file responsive pleadings or a counter-affidavit in effect constituted an admission of the facts contained in the board's affidavit. Additionally, the court held that the professors' unverified complaint, alleging on information and belief that they were not re-employed because of their union activities was insufficient to raise a triable issue of fact. The court said that for the professors to contend that such information was not available to them was irrelevant because rules of the state supreme court specifically provided for such exigency.

The court also rejected the argument of the professors that the board had a duty to provide them with a specific statement of reasons for the decision not to renew their contracts under the faculty constitution of the college and other documents. The court pointed out that the professors' contracts were specifically made subject only to the bylaws, policies and practices of the governing board and thus the sole duty of the board was to provide the notice of nonretention within the required time. Accordingly, the decision of the trial court in favor of the board was affirmed.

NOTE: The Supreme Court of the United States denied a review from this decision.

Hopkins v. Board of Education of the City of Chicago
330 F.Supp. 555
United States District Court, N.D. Illinois, E.D., August 25, 1971.

A certified but nontenured teacher brought suit under the federal civil rights act against the board of education and the city of Chicago, seeking damages and injunctive relief. The teacher alleged that he was terminated for the exercise of his First Amendment rights in violation of the Constitution.

At the time the teacher's services were discontinued, he was serving as a day-to-day substitute in a high school. The school board asserted that the teacher was terminated for failure to perform his duties on May 20, and 21, 1971, and not for a critical speech he had made the week before. The court agreed with the board that there was no evidence of a connection between the speech and the termination.

However, the teacher contended that the lack of any real reason for termination would lead to the inference that it was because of the speech. The question before the court was whether the teacher had adequately performed his duties on the days in question. It appeared from the evidence that during the two days in question there was an effective student boycott and the confused situation resulting therefrom was aggravated by a series of fire alarm bells causing students and faculty to spend considerable time in vacating and re-entering the building. Because of the boycott, the principal had specifically instructed all teachers to either attend class or leave the building. On May 21, the principal asked the teacher to either "follow the program" or leave. The teacher responded that he would decide later what he was going to do. The teacher was then told to report "downtown." The court found from the evidence that the school board had reason to believe that the teacher was not following the prescribed program of teaching his classes and that he had failed to show an unconstitutional and ulterior motive for the action of the school officials.

The teacher then contended that he was denied procedural due process in that he was not given a more specific statement of reason for his termination and a more complete review before it became final. The teacher had met with the director of teacher personnel and several other school officials and had two union representatives

present with him. It was the opinion of the court that he was accorded as much due process as the Fourteenth Amendment entitled him to. The court said that although the procedure in this instance may have been somewhat peremptory, it must be remembered that the teacher was a day-to-day substitute without tenure and that he was told specifically why he was being terminated. Also, there was a higher review of the principal's decision to terminate him. The court agreed with the teacher that he should not be terminated even as a nontenure teacher for reasons that were calculated to interfere with his constitutional rights to free speech and that prior to termination, he should be advised of the reasons and be given a reasonable opportunity to present his side of the matter to responsible school officials. However, to obtain relief under the civil rights statute, the teacher must prove that he had been deprived of a constitutional or statutory right by the action of the school board. The court concluded that the teacher failed to do so and, therefore, could not recover.

Shirck v. Thomas
447 F.2d 1025
United States Court of Appeals, Seventh Circuit, September 2, 1971; rehearing denied September 24, 1971. Judgment vacated, U.S. Supreme Court, June 29, 1972.
(41 U.S. Law Week 3001).

(See *Teacher's Day in Court: Review of 1970*, p. 38.)

A nontenure high-school teacher of German was notified during her second year of employment that she would not be recommended for reemployment. The reason given for the proposed action was that she had failed to coordinate her teaching with that of the other German teacher so that students would not be handicapped in transferring at the end of a semester. There was a dispute as to whether this had previously been discussed with the teacher and also whether she had been told that she could attend the board meeting at which the decision would be made on the renewal of her contract and give her position. The teacher did not attend the meeting.

The teacher brought suit under the federal civil rights act, alleging that the action of the board deprived her of her constitutional rights. The trial court noted that the teacher had been given the reason for the action of the school board and concluded that it was immaterial whether she had been told she could attend the board meeting and have an opportunity to explain and support her position. Summary judgment was granted in favor of the board.

On appeal the appellate court referred to its decision in *Roth v. Board of Regents* which held that a nontenured university professor was constitutionally entitled to reasons for nonretention and a hearing at which he could respond. The appellate court held that the same principle applied to a high-school teacher, and, therefore, summary judgment was improper because there was an issue as to whether the teacher was offered a hearing at which she could respond. As in *Roth*, the court said, the test is one of balancing the public school's interest in selecting its permanent teaching staff against the professional reputation, employability, and career interests of the teacher in retaining her job. Accordingly, the appellate court held that the teacher was entitled not only to the statement of reasons which she did receive, but also to notice of a hearing at which she might respond to the stated reasons.

In her arguments, the teacher sought to have the court go further than the requirements of *Roth*. She sought to have the court rule that she could not be dismissed for failure to coordinate her teaching unless the school board could show that it had defined in advance the standard of conduct required and had informed the teacher of it. The appellate court disagreed, noting that a teacher may be assumed to be competent in matters of classroom performance, and "the school must have considerable freedom to refuse to retain a probationary teacher who does not meet imprecise, though nonetheless valid, standards of competence." In addition, the appellate court agreed with the district court in *Roth* in rejecting advance specification of standards.

The teacher also sought a type of hearing that would impose a greater burden on the school board and one that would be before an independent tribunal. The appellate court found no reason why the hearing before the board would not be adequate and again agreed with the district court in *Roth* that the burden of proof was on the teacher.

The summary judgment in favor of the school board was reversed and the case remanded for further proceedings.

NOTE: An appeal from the decision in this case was filed with the Supreme Court of the United States. On June 29, 1972, the court vacated the judgment and remanded the case to the lower court for further reconsideration in the light of the decision in *Roth v. Board of Regents*, decided that day. (See p. 80 of this report.)

Simcox v. Board of Education of Lockport Township High School District No. 205, Will County, Illinois
443 F.2d 40
United States Court of Appeals, Seventh Circuit, May 12, 1971.

A teacher employed as a high-school guidance counselor, appealed from an adverse lower court decision in his civil rights complaint against the school district. During his second year of employment the teacher had received written notice that his contract would not be renewed for the next year, thereby denying him tenure under state law. The teacher brought suit, charging that his constitutional rights under the First Amendment had been violated.

The principal thrust of the teacher's complaint was that the four reasons given by the school board for nonrenewal were untenable and, therefore, he must have been terminated because of the exercise of his constitutional rights. The given reasons were "resistance" to attend evening parent meetings, refusal to submit weekly guidance reports, refusal to participate in a photo project, and refusal to perform compensated extra duties in emergency situations. There was evidence that other counselors were erratic in their attendance at the weekly parents meetings and opposed to handing in the weekly reports. There also existed other areas of discontent among the counselors in the school district. This counselor and another were the representatives to speak to the administration. This counselor was also active in the local teachers union and a member of the negotiating team. It was his contention that it was these activities that caused his discharge and not the reasons given by the board.

The court found no evidence to indicate union animosity by the board but did find evidence to indicate refusal to perform extra duties by the teacher. The court quoted from the dismissal notice given the counselor by the board: "There are many duties involved with being a contributing staff member that surround the specific primary function of the staff member. Such duties, while necessary in the total educational process, cannot be written into a contractual obligation, but instead depend on the professional attitude, ethics and self direction displayed by the staff member in cooperating with the administration in the school operation." The court found that the evidence adequately supported the conclusion of the school board that the teacher was dismissed because of this lack of self direction and cooperation in relation to extra duties.

The final argument of the teacher, that he was denied equal protection of the laws, was found wanting in merit by the court. Although other counselors who shared his views were retained while he was not, the court said that the record disclosed no evidence that they shared this counselor's view that he would not perform any duties not written into his contract.

On the finding that the school board acted in good faith and that no constitutional right of the counselor had been violated, the judgment of the lower court in favor of the school district was affirmed.

Kansas

Endicott v. Van Petten
330 F.Supp. 878
United States District Court, D. Kansas, August 12, 1971.

A teacher in Unified School District No. 260 was notified that his contract would not be renewed for the 1970-71 school year. He brought suit against the school superintendent and the members of the school board, charging that his nonrenewal was in violation of the equal protection and due process clauses of the Fourteenth Amendment and that jurisdiction existed under the federal civil rights act. The thrust of the teacher's complaint was that the failure of the board to give him notice of the reasons for his nonrenewal and a hearing on those reasons was arbitrary.

The school board asserted that it was immune from suit, that the teacher had no constitutionally protected right to continued employment, and that no claim had been asserted against the individual school officials. The defendants did not answer the allegations of fact in the teacher's complaint, and this case was heard on their motion to dismiss the complaint.

The teacher had been employed by the school district for five years prior to being notified that his contract would not be renewed. Under Kansas law, tenure is not available in districts the size of this one, but employment contracts continue from year to year unless the school board gives notice prior to March 15 of the contract year of its intention to terminate the contract. The teacher alleged, and it was not denied by school officials, that he had been highly evaluated in the 1969-70 school year and the sole reason for the nonrenewal of his contract was the superintendent's dissatisfaction with the manner by which the teacher attempted to discipline his son. The teacher further alleged that the school district had in effect a "fair dis-

missal procedure policy" which required a hearing before nonrenewal of a teacher's contract.

To bring an action under the federal civil rights act, two elements are necessary: first, that the action complained of was done under color of state law, and second, that the action deprived a person of some constitutional right. In this instance the court said there was no doubt that the nonrenewal of the teacher's contract was done under color of state law. The remaining question was then whether the teacher had alleged the deprivation of a constitutional right. Upon review of numerous cases of constitutional rights of teachers whose contracts had not been renewed, the court found a "certain degree of confusion between determining, on the one hand, the existence of a constitutionally protected right and, on the other hand, the degree to which the established right should be protected, i.e., the quantum of procedural due process that is required in denying or terminating the right. The court found it relevant that the applicable state law provided that a teacher's contract continues from year-to-year unless "written notice of *intention* to terminate," is given. This type of statute, the court said, anticipated more than mere notice of termination and gives teachers a certain degree of security in their positions. The court concluded that the teacher had sufficiently pled the existence of a constitutionally protected interest. This, the court said, was not only the privilege of public employment but also protection of the valuable inalienable right to pursue one's chosen occupation coupled with a right or interest of an expectancy of continued employment which could not be denied without due process. The court found it unnecessary to determine the exact nature of the procedures that the school officials had to make available to the teacher in this instance since this case was before the court on the school board's motion to dismiss. That motion was denied and the court directed that the matter proceed to trial on the merits.

Louisiana

Hill v. Caddo Parish School Board
250 So.2d 446
Court of Appeal of Louisiana, Second Circuit,
June 22, 1971.

A teacher sought a court order to compel the school board to reinstate him as a teacher and to pay his salary for the remainder of the 1970-71 school year. The trial court dismissed the case, and the teacher appealed.

The teacher was employed for the 1969-70 school year under a temporary certificate. He was re-employed for the 1970-71 school year and was issued another temporary certificate. On December 4, 1970, he was notified that his employment would cease as of January 15, 1971, for the primary reason that he was not a certified teacher. The teacher alleged that he, as a probationary teacher, was not discharged in accordance with provisions in the tenure law relating to discharge of probationary teachers. The school board maintained that holders of temporary certificates were not protected by the tenure law.

The appellate court agreed with the school board's interpretation. The tenure law defines a teacher as one "who holds a teacher's certificate and whose legal employment requires such teacher's certificate." Under state board of education rules, a temporary certificate is issued for one school session only and employment of teachers in positions where they are not regularly certified is authorized upon recommendation of the employing school superintendent who must certify that there is no certificated teacher available for the position. After viewing the teacher tenure law, the appellate court found it clear that the protection of the tenure law was not intended to apply to persons holding temporary certificates. The tenure law, the court said, protects a teacher in re-employment from year to year as well as from dismissal during the year. A temporary certificate which is valid for one year only, obviously did not carry with it any right to re-employment.

The court held that the teacher did not have the protection of the tenure law. Therefore, the school board did not have to comply with the tenure law in dismissing the teacher. The decision of the trial court was affirmed.

Massachusetts

Mailloux v. Kiley
323 F.Supp. 1387
United States District Court, D. Massachusetts,
March 22, 1971.

A high-school English teacher was discharged because of his use of a certain taboo word in class. The district court issued a preliminary injunction ordering the teacher reinstated pending a trial on the merits. The appellate court affirmed (436 F. 2d 565). This case involved the merits.

On October 1, 1970, during a class discussion of a book, the teacher introduced the subject of society and its ways as illustrated by taboo words. He then wrote a slang expression for sexual inter-

course on the board and asked the class in general to define it. The definition was supplied by a volunteer. The following day, the parent of a female student, being erroneously informed that a particular girl had been asked for the definition, complained to the principal who in turn asked the head of the English department to investigate the incident. Following the interview with the head of the department the teacher was suspended by the superintendent.

A hearing was requested before the school committee. After the hearing the committee discharged the teacher on the general charge of "conduct unbecoming a teacher" without making a finding as to any specific particular, including whether the teacher had called upon a particular girl for the definition.

The court made additional findings of fact, including that the topic of taboo words had a limited relevance to the novel under classroom discussion and a high degree of relevance to the proper teaching of eleventh-grade basic English; that the word in question was relevant to a discussion of taboo words; that eleventh-graders had sufficient sophistication to treat the word from a serious educational viewpoint; that the teacher's action did not have a disturbing effect on the class; that calling on a volunteer to define the word was reasonable; that the word is in books in the library; and that the opinion of experts differed on whether the action of the teacher was appropriate and reasonable under the circumstances and served a serious educational purpose.

Turning to the question of law, the court noted that the Fourteenth Amendment recognizes "that a public school teacher has not only a civic right to freedom of speech both outside . . . and inside . . . the school house, but also some measure of academic freedom as to his in-classroom teaching." The court cited two cases involving academic freedom for teachers, *Keefe v. Geanakos* (418 F.2d (1969)), and *Parducci v. Rutland* (316 F.Supp. 352, (1970)). One upheld the substantive right of a teacher to choose a teaching method which in the court's view served a demonstrated educational purpose. The other upheld the procedural right of a teacher not to be discharged for the use of a teaching method not proscribed by regulation. Relying on both these cases, the teacher argued that both his substantive and his procedural rights protected by the Fourteenth and First Amendments were violated by his discharge.

In view of the evidence of divided professional opinion as to whether the teaching method used by the teacher was proper, the court could not say that the teacher's method was plainly permissible in the constitutional context. Taking note of the age of the students, their level of maturity, and other factors relevant to the public school situation, the court ruled "that when a secondary school teacher uses a teaching method which he does not prove has the support of the preponderant opinion of the teaching profession or of the part of it to which he belongs, but which he merely proves is relevant to his subject and students, is regarded by experts of significant standing as serving a serious educational purpose, and was used by him in good faith the state may suspend or discharge a teacher for using that method but it may not resort to such drastic sanctions unless the state proves he was put on notice either by a regulation or otherwise that he should not use that method." This exclusive procedural protection, the court said, is afforded to the teacher not because he is a public employee but because "in his teaching capacity he is engaged in the exercise of what may plausibly be considered 'vital First Amendment rights.' "

Since in this case it was not claimed that any regulation prohibited the method utilized by the teacher, nor could it be said that the teacher should have known that his teaching method was not permitted, it was a violation of due process for the school committee to suspend and discharge him on that account. Accordingly, the teacher was entitled to continued employment through the 1970-71 school year. The school officials were directed to expunge from his employment record all notation of the teacher's suspension or discharge. The teacher was also awarded lost salary for the period his employment was discontinued. However, the court noted in conclusion that school authorities are free to suspend a teacher who is using teaching methods of which they disapprove until such time as he agrees to cease using such methods.

Mailloux v. Kiley
448 F.2d 1242
United States Court of Appeals, First Circuit,
September 23, 1971.

(See case digest immediately above.)

The school board appealed the decision above to the First Circuit Court. To support its position, the school authorities pointed to a statement in the Code of Ethics of the Education Profession that the "teacher recognizes the supreme importance of the pursuit of truth, devotion to excellence and the nature of democratic citizenship." The appellate court said that this standard, though laudable, is

impermissibly vague as notice to the teacher that he should not have engaged in the activity complained of. This standard, the court continued, could not justify a post facto decision by the school authorities that use of a particular teaching method is ground for discharge or other serious sanction, simply because some educators disapprove of it.

In affirming the decision of the district court, the appellate court rejected the guidelines laid down by that court for permissible teaching methods. The appellate court was of the opinion that "any such formulation would introduce more problems than it would solve." The appellate court saw "no substitute for a case-by-case inquiry into whether the legitimate interests of the authorities are demonstrably sufficient to circumscribe a teacher's speech."

Roumani v. Leestamper
330 F.Supp. 1248
United States District Court, D. Massachusetts,
July 2, 1971.

A nontenured professor at Worcester State College brought a civil rights suit against the president of the college and other college officials, alleging that their failure to reappoint him to his position for the 1971-72 academic year deprived him of due process under the Fourteenth Amendment. He sought a preliminary injunction restraining the college officials from terminating his employment until he had been afforded due process rights.

The teacher was in his second year of teaching at the college and, therefore, entitled to notification prior to December 15, if he was not to be reappointed. He was first notified on March 2, 1971, by the president that he would be re-employed for the 1971-72 academic year. Then on April 16, his resignation was requested for 1971-72, and he was informed that nonrenewal of his contract would be recommended. The reason given by the president was that he had received information contradicting representations made by the teacher concerning the progress of his doctoral studies. On May 14, 1971, the teacher was informed that his contract would not be renewed and was invited to attend a meeting with the president. He attended this meeting and presented evidence on the progress of his studies but no further action regarding his status was ever taken. Suit was then brought.

The teacher argued that he had been deprived of constitutional rights to due process, while the college officials countered by stating that the teacher's injury, if any, arose from a contract dispute more properly litigated in state court. In making a determination of the teacher's rights, the court noted that he was not tenured and, therefore, was not entitled to the procedures afforded to tenure faculty; also, he had not alleged any constitutionally impermissible motive for his discharge. However, the court found that the teacher was in a markedly different position than he would have been if notified of the nonrenewal on December 15. Had he been notified on that date, he would have been entitled only to a statement of reasons for nonretention as set out in *Drown v. Portsmouth School District.* (See page 73 of this report.) The teacher contended that since he was not notified of nonrenewal by December 15, the passing of that date operated to extend his contract, or at least justified an expectation of re-employment on his part. The court was of the opinion that the timing of his release placed him in a substantially disadvantaged position vis-a-vis those notified of nonreappointment in the prescribed manner, and to determine the precise extent of this disadvantage and its due process implications, it was necessary to balance the competing interests of the teacher and the college. The court found that the college had an interest in maintaining a competent faculty, and that the teacher had two arguably protectable interests: an expectancy of continued employment under the facts involved, and the protection of his professional reputation. In light of the absence of specific procedures in this case, the gravity of the charges made by the college and their necessary effect on the teacher's professional reputation, the court held that the teacher's interests "clearly merit greater procedural consideration than has been afforded."

Concluding that due process requires a statement of charges and a hearing, the court granted the preliminary injunction sought by the teacher. Pending a hearing on the merits, the college officials were enjoined from failing to renew the teacher's contract unless prior to its expiration he had been provided with a particularized statement of the charges against him, an opportunity to be heard, with counsel, by the board of trustees, and notice of that body's decision. Further, the court ordered expunged any notation of the termination of the teacher's contract which may have been made in records of the college.

Michigan

Fucinari v. Dearborn Board of Education
188 N.W.2d 229
Court of Appeals of Michigan, Division 1,
March 29, 1971.

The state tenure commission directed the board of education to re-employ a probationary teacher as a tenure teacher. The trial court affirmed this decision, and the board of education appealed.

During her second year of service, the teacher was notified on April 1, 1969, that she would not be re-employed because of unsatisfactory performance. This letter was from the director of personnel. State law requires that in the case of a probationary teacher whose performance is unsatisfactory, the school board notify him at least 60 days prior to the end of school of the unsatisfactory service and of discontinuance of services. In this instance, at an executive meeting of the school board in March, the director of personnel had informally discussed this teacher's case and had been told to send the 60-day letter *if* the school administrators still viewed the teacher's performance as unsatisfactory. It was uncontroverted that the board did not formally take final action on the non-re-employment of the teacher until its regular meeting of April 14, 1969, and admittedly the teacher was never given any notification of this final action. Since the last day of school was June 13, this was not within the 60-day period.

The court held that because of failure of the school board to comply with the statutory provisions, the teacher was entitled to be employed for the next school year. And having completed two years and been reappointed for the next year, the teacher attained continuing tenure status, and was entitled to the protection of the teacher tenure law.

Weckerly v. Mona Shores Board of Education
184 N.W.2d 323
Court of Appeals of Michigan, Division 2,
December 1, 1970.

The state tenure commission ordered that a probationary teacher be returned to her employment as a tenure teacher. The trial court vacated this order, and the teacher appealed. The teacher was completing her second year of employment in the school system when the superintendent recommended that she be placed on a third year of probation because of unsatisfactory classroom discipline. For the same reason the school board voted to terminate her contract at the close of the 1967-68 school year, the end of the second probationary year.

On April 8, 1968, the superintendent sent a letter by certified mail to the teacher, informing her that her contract would not be renewed. The same day the school principal orally informed the teacher of the same fact. The teacher was not at home when attempted delivery was made of the certified letter, and a mail arrival notice was left in her mailbox. The teacher who was blind, testified that she searched for the *expected* letter for the next few days but did not find either the letter or the mail arrival notice. The teacher actually received the letter on April 13, and it was read to her.

The state statute requires that probationary teachers receive at least 60 days' written notice before the close of the school year that their services will be discontinued. In this case the sixtieth day before the close of school was April 9, 1968.

The appellate court rejected the arguments of the teacher that the applicable statute was unconstitutional, that she was denied procedural due process, and that there was no basis for the determination that her services were unsatisfactory. The court concluded that the certified letter sent to the teacher by the board satisfied the 60-day statutory notice requirement even though the teacher did not receive the letter until 56 days prior to the end of the school term. In reaching this conclusion, the appellate court took notice of the fact that the teacher was given 61 days' oral notice and that the letter was mailed 60 days prior to the end of the school year. The court held that the teacher had not attained tenure, and, therefore, the state tenure commission had no jurisdiction. The opinion of the trial court was affirmed.

Minnesota

Pearson v. Independent School District No. 716
188 N.W.2d 776
Supreme Court of Minnesota, June 25, 1971.

A probationary teacher who was not re-employed for the 1970-71 school year sued for a declaratory judgment that he had a contract for that school year because of the failure of the board to comply with state law regarding probationary teachers.

It appeared that the teacher had been notified prior to April 1, 1970, that his contract would not be renewed for the following school year. He then requested the reasons for this action and received a letter from the board stating them, including in the letter the statement that "adequate supervision has been furnished your classes and several conferences with your principal have been conducted." It was the position of the teacher that he had not been furnished "adequate supervision" and that under state law such must have been provided and, therefore, he had a contract for the next school year.

The school board maintained that it had complied with all requirements of state law relating to the nonrenewal of his contract and denied that he was entitled to continued employment. The trial court ruled in favor of the school board. The teacher appealed.

The issue on appeal was whether state law required a hearing on the question of whether "appropriate supervision" was furnished to a probationary teacher before a school board may decide not to renew his contract. State law provides that the contract of a probationary teacher may or may not be renewed "as the board shall see fit" and requires that if a probationary teacher whose contract is not renewed shall request the reasons for the action, "the school board shall give the teacher its reasons in writing, including a statement that appropriate supervision was furnished describing the nature and extent of such supervision furnished the teacher during his employment by the board." The teacher argued that it was the legislative intent that the board furnish supervision and, therefore, if the teacher challenges the school board statement that supervision was furnished, there must be a hearing on the issue.

The appellate court did not agree with the teacher, since the statute says that the contract of a probationary teacher may or may not be renewed as the school board sees fit. Additionally, the statute specifically sets out when hearings will be held and this instance did not fall under any category requiring a hearing.

Holding that the state legislature did not intend to provide a hearing to a probationary teacher whose contract was terminated, and that the board of education had fully complied with state law regarding nonrenewal of probationary teachers, the appellate court affirmed the decision of the lower court in favor of the board of education.

Missouri

Long v. Board of Education of the City of St. Louis
331 F.Supp. 193
United States District Court, E.D. Missouri, E.D., June 25, 1971; judgment affirmed 456 F.2d 1058, U.S. Circuit Court of Appeals for the Eighth Circuit, March 13, 1972.

Two probationary teachers brought a civil rights action, charging that they were denied re-employment for constitutionally impermissible reasons. One teacher was project director of a diagnostic and adjustment center funded under Title III, ESEA, and the other teacher was a staff member of the center. The director of special education of the school system had supervisory control of the center. Both teachers were initially employed for the 1967-68 school year and re-employed for the 1968-69 school year. However, by letter dated April 7, 1969, they were informed that their contracts would not be renewed for the next school year. Under Missouri law there is a three-year probationary period.

Plaintiffs' position was that the staff member was not rehired because of a critical letter she wrote to a state representative and that the director of the project was not rehired for refusing to discharge the staff member. The difficulties leading up to the letter began when the center was informed that federal funds would be available for a 1968 summer project and was asked to draw up a program. The program was prepared by the staff member and presented to the director of special education. He reduced the total amount of the request by $10,000 by deleting some items. Nevertheless, when the project was put into final form by the two teachers, it contained all of the original items. The supervisor was never informed of this action. The state department of education upon consultation with the director of special education reduced the project by deleting the same items previously cut out. The project was satisfactorily conducted by the staff member, but the required evaluation at the end of the summer was quite late.

The following year, funds again became available for a summer project, and again the supervisor directed the two teachers to prepare a project for submission. The project was prepared by the staff member, but was submitted late with the result that it was not funded. The supervisor had asked for a copy of the program when it was completed, but this request was ignored by the staff member. Several days after the program was submitted, a state department official asked the staff member if the project could function on less than was requested since there was limited money available. The letter to the state legislator was written the following day.

The court found it apparent from the evidence that neither of the two teachers could adjust to the fact that the director of special education was their superior and that they were responsible to him. The court said that their conduct followed a pattern of either failing to follow explicit directions of their superior or of dragging their feet in order to avoid timely consultation with him. In the evaluation of the project director which the superior made at the end of her first year, note was taken of the need for improvement in certain areas,

including compliance with school-board rules, regulations, and policies, and filing required reports promptly and accurately. The unsatisfactory rating at the end of the second year was based on a determination by the superior that the project director "has continued to refuse and accept and follow the administration's decisions and policies made by the Office of Special Education to which she was directly responsible."

As for the staff member, her satisfactory rating at the end of the first year was prepared by the project director and accepted by the superior who had no personal contact with her. By the end of the second year, the supervisor was convinced that it would be undesirable to re-employ her. It was not disputed that the letter written to the state representative had a bearing on the teacher's discharge, but the decision was not based on the contents of the letter per se, rather upon what it disclosed. The teacher wrote the letter on official school-board stationery and signed it in her official capacity, so that it could reasonably be concluded, the court said, that she was undertaking to speak on behalf of the school board as its representative without consulting its policymakers and thereby "evidenced her intent and purpose of usurping authority that did not belong to her." The court said further that throughout the letter the teacher continually used "we" and "our" as if speaking on behalf of the school board. The court concluded that the nature of the letter was such that, to the extent that it influenced the decision not to re-employ the teacher, it did not fall within the constitutionally protected area of free speech and right of petition. While the court found that the teacher had the right to express herself as an individual, she did not have the right to speak for the board or to misrepresent its position.

The court also concluded that the refusal of the director to discharge the staff member for writing the letter was not the cause of the director's nonrenewal. The court held that the nonretention of the two teachers was not based on impermissible constitutional grounds but rather was the result of good faith discretion by the school superintendent in the light of the facts available to him as disclosed by the recommendations of the teachers' superior and his own appraisal of the situation. Judgment was entered in favor of the school board.

NOTE: This decision was affirmed on appeal on March 13, 1972 (456 F.2d 1058). The United States Court of Appeals for the Eighth Circuit rejected the teacher's claim that the nonrenewal of her employment was for constitutionally impermissible reasons. The court held that in the circumstances the letter she wrote to the state legislator was not protected speech under the First Amendment.

Nebraska

Ahern v. Board of Education of School District of Grand Island
327 F.Supp. 1391
United States District Court, D. Nebraska,
April 20, 1971; affirmed, U.S. Court of Appeals,
Eighth Circuit, 456 F.2d 399 (February 29, 1972).

A nontenure teacher discharged during her contract term brought suit under the federal civil rights act, seeking reinstatement and damages. She alleged that her right to free speech, due process, and right to teach under the First, Fifth, and Ninth Amendments to the Constitution had been violated.

The teacher had been employed as an economics teacher from September 1966 until her discharge in March 1969. She already had a contract for the 1969-70 school year. Following her attendance at a civic institute summer seminar, the teacher became acquainted with a new teaching method, that of inquiry. The teacher also became more aware of and sensitive to the area of student rights, and this was reflected in her teaching. In the belief that her consumer economics and economics classes were becoming too political, the teacher was questioned about her teaching method in February 1969. However, the basis for her discharge arose in March. While the teacher had been away a week attending a seminar, a substitute was employed to teach her classes. On her return, her students reported that the substitute had not taught the class as the teacher would have and in one class had seized a boy by the hair and slapped him across the face. The teacher became quite angry, referred to the substitute as a "bitch," and told her students that if this happened again, she hoped that they would all walk out. Also on that day the teacher discussed the slapping incident with another of her classes and focused the students' attention on drafting a proposed school regulation regarding corporal punishment. She wished to have the resolution presented to the high-school student council.

On March 19, 1969, the teacher was called to a meeting in the principal's office with other school officials. There she was upbraided for her remarks about the substitute teacher; told her educational philosophy did not "fit in this school," that her main function was to teach economics, and directed that she return to her classroom and not

discuss the slapping incident any more and to get her classes under control. The teacher ignored these admonitions and the following day spent at least one entire class discussing the incident, the proposed resolution, and the advisability of the students holding a preschool meeting the next morning. When this was reported to the principal, the teacher was again called in and informed that she was being suspended with pay until action was taken by the board of education. After the meeting with the school board, at which the teacher was present with counsel, the board voted to declare the teacher's position vacant, her 1968-69 contract terminated, and her 1969-70 contract void for insubordination.

The court had no difficulty in determining that the teacher had been accorded substantive due process. There was reason for the action of the board because of the insubordination of the teacher arising from directives stemming from the criticism in class of a fellow teacher in the slapping incident, her refusal to follow the directives of the principal to teach economics, and the steps taken by the teacher during classroom hours in seeking consideration of a declaration of student rights. The court was persuaded that the exercise of a constitutional right was not the basis for the discharge. Although a teacher, like any other citizen, has a right to express opinions on matters of public concern, the court said, still, it doubted that the teacher had "a right to express them *during class* in deliberate violation of a superior's admonition not to do so, when the subject of her opinions and concerns is directly related to student and teacher discipline." The court held that while the teacher had a right to express disagreement with the administration, she did not necessarily have a right to express that disagreement in the classroom when, as here, reasonable alternative means for expression of dissent were available.

The matter of procedural due process was more troublesome to the court. A number of recent cases involving the nonrenewal of teachers' contracts, the court observed, had reached opposite conclusions on the need for a statement of reasons and a hearing. The court here also noted two cases of the Supreme Court of the United States involving procedural due process, one of a welfare recipient, *Goldberg v. Kelly* (90 S.Ct. 1011 (1970)), and the other of a cafeteria worker in a military establishment, *Cafeteria and Restaurant Workers v. McElroy* (81 S.Ct. 1743 (1961)). The former case held a hearing necessary before a denial of benefits, and the latter case held a hearing unnecessary. Because of the uncertainties these cases produced in the mind of the court and the lack of a Supreme Court pronouncement in the area of due process for teachers, the court here held, in accordance with the appellate court for the circuit, that absent statutory or contractual requirements, there is no constitutional right to a hearing upon discharge with rights of cross-examination and confrontation of witness. Here there was no contractual right to a hearing, but a statutory right did exist upon filing of a written request by the teacher whose contract is terminated. Since the teacher never requested a hearing, judgment was rendered for the school board.

NOTE: On February 29, 1972, the United States Court of Appeals for the Eighth Circuit affirmed this decision, holding that the school board had ample cause to dismiss the teacher for insubordination and that the lower court was correct in deciding that insubordination was the basis for the dismissal. The hearing provided the teacher was adequate to insure her constitutional right to procedural fairness and a meaningful hearing, the court held, since the teacher understood that the basis for her suspension and dismissal was insubordination by reason of her failure to comply with the school principal's instruction regarding restoration of order and proper curriculum in her classes, received advance notice of the proposed school board hearing at which she appeared, and was represented by counsel, and was permitted to testify and cross-examine the principal. (456 F.2d 399)

New Hampshire

Chase v. Fall Mountain Regional School District
330 F.Supp. 388
United States District Court, D. New Hampshire,
July 28, 1971.

A nontenure high-school English teacher whose contract was not renewed for the 1970-71 year sued the school district and officials of the district. He charged that the failure of the district to renew his contract was a denial of his constitutional rights of freedom of speech and association since the decision was based in whole or in part on his activities as negotiator for the teachers association and that his Fourteenth Amendment rights to due process were violated and that the action of the school board was arbitrary, discriminatory, and capricious.

The teacher had been employed by the school district since the 1968-69 school year. During that year he was an active and outspoken member of the negotiating committee for the teachers associa-

tion. During negotiations he issued press releases critical of the school board which irritated its members. Nevertheless, the teacher's contract was renewed for the 1969-70 school year. His principal had strongly recommended that he be rehired and had rated him very high in every category.

In the fall of 1969 the teacher was appointed chief negotiator for the teachers association. As negotiation proceeded, the teacher became disenchanted with the attitude of the school board toward a contract for the teachers and toward him personally. He ultimately stopped serving as negotiator because he felt that the animosity of the board toward him prevented him from being an effective spokeman for the teachers. In January 1970, a female student complained to the principal that the teacher had been paying special attention to her and had touched her. On cross-examination it turned out that the girl had a poor academic record, had failed the teacher's English class, and had talked to the daughter of a school board member about the teacher prior to her complaint. A few days later the daughter, also a student, and another student complained about the teacher to another teacher. Their complaints were of a general nature concerning allegedly offensive remarks made in class by the teacher, and the first girl testified that the teacher had touched her.

There was additional student testimony regarding rumors around the school about the teacher's conduct in college and while teaching in another town. There was no testimony as to when these rumors started but it was about the time of the complaints to the principal. The principal spoke with the teacher after each of the complaints. He also recommended that the teacher be rehired and rated him excellent in every category, including "relationship with students."

The superintendent testified that he attempted to check the truth of the rumors but got no results, and the rumors remained unverified. He also testified that he received inquiries and complaints from parents. Based on these factors he made the decision not to renew the teacher's contract, allegedly because he had "lost his effectiveness as a teacher in the district." The court noted that this recommendation was made notwithstanding that the superintendent was unable to check the rumors and had not talked to the teacher or to the girls who had complained about him. The superintendent admitted that his recommendation of nonrenewal was made on the complaints and rumors, and the recommendation would have been the same whether they were true or false. At its next meeting, the school board accepted the recommendation and voted 5-2 not to renew the teacher's contract. Three of the five board members voting for nonrenewal had not heard about the girls' complaints or the rumors. The teacher was never explicitly given the reasons for this decision. He asked the board to reconsider but the board refused. In the light of these facts, the court found it understandable that the teacher never requested a hearing.

On the basis of the evidence, the court found that the teacher's dismissal was a result of both his association activity, an exercise of constitutionally protected rights, and the complaints of the girls and resulting rumors. The court said that the teacher's negotiating activities clearly contributed to what could only be termed a total disregard on the part of the superintendent and the school board as to the truth of the complaints and rumors and the failure of the superintendent and the board to assess their effect on the teacher's suitability. Even if the testimony of the girls was to be believed, the court said, the facts fell far short of demonstrating any impropriety on the part of the teacher.

The court noted that there was no doubt that the teacher could not be discharged because of the exercise of his constitutional rights of freedom of speech and association. When it is alleged that the discharge is for that reason, the reasons for the decision must be carefully examined to ascertain that they are not a mere facade to conceal that discharge was for a constitutionally impermissible reason. Since here the evidence disclosed that the reason given was not entirely a facade, the court disregarded the First Amendment involvement for a moment and looked at the other reasons to determine if the board's decision was constitutionally permissible. According to the court, the issue then became whether a nontenure teacher was protected by the due process clause of the Fourteenth Amendment from an arbitrary decision.

The court first looked at the case of *Drown v. Portsmouth School District* (435 F.2d 1182, (1970)), which was binding upon the court. That case held that a nontenure teacher has no right to a hearing but does have a right to receive the reasons for nonrenewal of his contract. However, that decision was to be prospective only and would not apply here since the decision not to renew the teacher's contract was made prior to *Drown*. Therefore, the school board did not violate procedural due process. The court was of the opinion, however, that *Drown* recognized a right of recovery for an arbitrary, discriminatory, or capricious dismissal of a nontenure teacher. Applying that to the present case, the court held that to "dismiss a teacher on the basis of uninvestigated complaints and unverified rumors and to admit

that the decision does not depend on the truth or falseness of the complaints or rumors is patently unjust, arbitrary and capricious." The testimony of the teacher's principal and immediate superior was to the effect that the teacher had not lost his effectiveness as a teacher. In short, the court said the action of the superintendent and the school board, without even minimal investigation and without any concern for the truth, presented a classic case of a violation of due process. Noting that *Drown* held that a hearing is not required in the case of a nontenured teacher, the court did not construe this to mean that a school board had an absolute right to dismiss a teacher without an inquiry to determine if legitimate grounds for dismissal existed.

Concluding that the reasons given by the superintendent for the nonrenewal of the teacher's contract were patently arbitrary, the court found the inference overwhelming that the action of the superintendent and the school board was motivated primarily by the teacher's exercise of his constitutional rights of freedom of speech and association. Accordingly, the court held the action of the board in discharging the teacher null and void as being in violation of the First and Fourteenth Amendments. The teacher was entitled to all the benefits of a 1970-71 contract and to immediate reinstatement. The school board was directed to expunge any notation of the nonrenewal from the teacher's record. Judgment was entered against the school district and individually against the superintendent and those members of the board who voted to discharge the teacher for $2,550, the amount of lost salary and the costs of the court action.

Drown v. Portsmouth School District
435 F.2d 1182
United States Court of Appeals, First Circuit,
December 18, 1970.

A nontenure teacher appealed from the district court dismissal of her suit against school officials. The teacher alleged that the failure of the school district to rehire her for the 1970-71 school year without giving her reasons for the action and a hearing violated her constitutional rights under the Fourteenth Amendment.

Under state law a nontenure teacher is given a hearing if dismissed during the school year, but nonrenewal requires notice only by March 15. The teacher in this case had been given timely notice during her second year in the school district. She had sought but was denied a list of reasons and a hearing at which she might have an opportunity to challenge the board's decision.

The appellate court noted that courts are divided on the issue of procedural rights applicable to nontenure teachers who are not rehired. The court said that in determining what procedures should be required in the decision not to renew the contract of a nontenure teacher, the court was required to balance the interests of the school board against the interests of the teacher to correct a decision based on mistaken or false facts, or to support a claim that he was not rehired for constitutionally impermissible reasons, or to know where his performance failed, or to minimize or overcome the reason in his discussion with a potential future employer. The court held that "the interests of the non-tenured teacher in knowing the basis for his non-retention are so substantial and that the inconvenience and disadvantages for a school board of supplying this information are so slight as to require a written explanation, in some detail, of the reasons for non-retention, together with access to evaluation reports in the teacher's personnel file."

However, the court held that a hearing was not required. Applying the same balancing process, the court concluded that the interests of society in promoting a better school system and in protecting the rights of the individual teacher would be served best by the detailed statement of reasons for nonrenewal of contract without a hearing.

The judgment of the district court was reversed and the case remanded to that court. If the district court found on remand that the teacher had not been given reasons for her nonrenewal, the same should be supplied by the school board. Further, for all teachers notified of nonrenewal subsequent to this decision, a statement of reasons must be provided.

New Jersey

Donaldson v. Board of Education of the City of North Wildwood
279 A.2d 112
Superior Court of New Jersey, Appellate Division,
June 22, 1971.

A nontenure teacher whose contract was not renewed on recommendation of the superintendent, thereby denying her tenure, appealed the local board decision to the state commissioner of education. The commissioner dismissed the claim, and the state board of education affirmed the decision. The teacher then sought judicial review.

The question before the court was whether the teacher had a constitutional right to be given a statement of reasons for the nonrenewal and a hearing on those reasons. The court ruled that

Zimmerman v. Board of Education, Newark (183 A.2d 25 (1962)), a New Jersey decision holding that a probationary teacher had no legal right to re-employment, was dispositive of the question. The court concluded by saying that "[u]nless and until our Legislature or Supreme Court adopts a different public policy, we feel bound by *Zimmerman* . . . and the long standing interpretation of our Education Laws by the State Department of Education to conclude that nontenure teachers have no legal right to a renewal of a teaching contract, or to a statement or explanation of the reasons for nonrenewal, or to a hearing as to the reasonableness of reasons for nonrenewal, absent a showing of unconstitutional discrimination."

The decision of the state board of education was affirmed.

New Mexico

Morgan v. New Mexico State Board of Education
488 P.2d 1210
Court of Appeals of New Mexico,
June 25, 1971;
rehearing denied July 21; certiorari denied
September 13, 1971
488 P.2d 1209.

A nontenure teacher was discharged by the Bloomfield Municipal School District during the term of his contract. He appealed to the state board of education which affirmed the decision of the local board. An appeal was then taken to the court.

The teacher had been discharged for inflicting punishment on children in a way that was in violation of a school policy of which he was aware. The state board found evidence to substantiate the local board finding that good cause existed for the discharge. The court agreed, saying that violation of a known policy to the extent shown by the evidence was good cause for discharging the teacher for failing to administer corporal punishment in a judicious manner.

What did concern the court, however, was the manner in which the discharge was effectuated. State law authorizes the state board to prescribe procedures to be used by local boards in supervising and correcting unsatisfactory work performance prior to notice of discharge. Pursuant to this statute, the state board adopted a procedure of requiring the local board to hold three conferences with the employee and to make a written record of the conferences, specifying the areas of unsatisfactory performance, action taken to improve such performance, and improvements made. This procedure was not followed in this case. The issue was the applicability of this regulation to the facts of this case.

The school board asserted that the teacher was dismissed for breach of contract, hence unsatisfactory work performance was not involved, and the requirement for conferences was not applicable. It was asserted that the punishment of the pupils could not be an aspect of work performance because the local board had not determined that work performance was involved. The court disagreed that the label attached by the local board was determinative of the issue. Looking at the facts of the case and a statute requiring teachers to exercise supervision over students, the court concluded that since the punishment was imposed while the teacher exercised supervision over the students, the punishment came within the term "unsatisfactory work performance."

It was then contended that the requirements for conferences should not be applicable here because the purpose of such conferences would be to establish a procedure for correcting teacher performance where it was correctable. The court found nothing to show that the teacher's action in imposing punishment on students in violation of known school policy was not correctable. No finding had been made by the state board on this point. One conference was held at which the teacher denied the charges of impermissible punishment. The teacher was then given the option of resigning or having charges brought, and the teacher refused to resign.

The court agreed that the nature of the punishment inflicted showed a serious situation. But in absence of any finding that the situation was not correctable and no evidence that any effort was made at any conference to correct the unsatisfactory work performance, the court held that the appropriate procedure should have been followed. Contrary to the view of the state board of education, the court found that there was a substantial departure from the required procedures which was prejudicial to the teacher. Therefore, the case was remanded to the state board with instructions to reverse the local-board decision.

New York

Canty v. Board of Education of the City of New York
332 F. Supp. 1009
United States District Court, S.D. New York,
January 21, 1971. Judgment vacated, United
States Supreme Court, June 29, 1971
(41 U.S. Law Week 3004).

(See *Teacher's Day in Court: Review of 1970*, p. 42.)

The federal court had previously denied the motion of a substitute teacher for a preliminary injunction to bar his discharge. At the hearing on the merits the teacher charged that his discharge, the unsatisfactory rating and the hearing at which this rating was upheld were "'arbitrary and capricious." The teacher also made some claims of procedural invalidity in his civil rights complaint.

The court said that this was not a civil rights case and merely labeling it as such did not make it one. The teacher's remedy, the court held, was to bring a suit in state court or to appeal to the state commissioner of education. The fact that the teacher did not avail himself of these state remedies and that these remedies could not now be brought because the time had expired, the court held, "does not give him a right to proceed in the federal courts. Any claim of violation of federal constitutional rights with respect to the hearing may be, or could have been, asserted in any state proceeding challenging the validity of his rating." Therefore, the motion of the school board to dismiss the action was granted.

NOTE: The Supreme Court of the United States granted a petition of certiorari for a review of this decision, vacated the judgment, and remanded the case to the U.S. Circuit Court of Appeals for the Second Circuit for further reconsideration in the light of the Supreme Court's decisions in *Roth v. Board of Regents* and *Perry v. Sindermann* (see p. 80 of this report) as well as its 1972 decision in *Lynch v. Household Finance Corporation.*

Community School Board 3 of the City of New York v. Board of Education of the City of New York
326 N.Y.S.2d 130
Supreme Court of New York, Special Term, New York County, Part I, November 17, 1971.

(See page 123.)

Hauppauge Classroom Teachers Association v. Millman
317 N.Y.S.2d 461
Supreme Court of New York, Appellate Division, Second Department, November 30, 1970.

The teachers association brought an action against school officials to compel the appointment of a music teacher to a tenure position. The trial court denied relief and the association appealed.

The appellate court held that the acceptance by the school district of the resignation of the teacher in question barred this proceeding. Further, the failure of the school officials to observe and evaluate the probationary teacher in accordance with the terms of the contract between the school district and the association did not confer any tenure rights on the teacher. The decision of the trial court was affirmed.

Lehman v. Dobbs Ferry Board of Education Union Free School District No. 3, Town of Greenburgh
323 N.Y.S.2d 283
Supreme Court of New York, Westchester County, June 7, 1971.

(See page 107.)

Tischler v. Board of Education of Monroe Woodbury Central School District No. 1
323 N.Y.S.2d 508
Supreme Court of New York, Appellate Division, Second Department, July 23, 1971.

A teacher brought suit against the board, seeking an order to compel it to grant her tenure. The trial court dismissed the complaint for failure to state a cause of action, and the teacher appealed.

In January 1967, the teacher was appointed for a three-year period. Shortly before the period expired, she was called to a meeting with her principal and other school officials who told her that it was not probable that she would be granted tenure at the next meeting of the board when the matter would be decided. The superintendent was unable to clarify the reasons behind this. At the next meeting of the board various school officials endorsed the recommendation of the superintendent that the teacher be granted tenure. The school board voted to deny tenure.

In her suit, she alleged that the board's action was a retaliatory measure designed to punish her because of the exercise of her constitutional right to engage in activities as a member of the local teachers union, that the decision of the board was arbitrary and capricious in that it was made not on the basis of any reasonable standard, and was made despite her professional competency as acknowledged by her superiors at the board meeting. The board contended that it had the absolute right to deny tenure to a probationary teacher for any reason or no reason.

The court noted that where the dismissal of or denial of tenure to a teacher constitutes inter-

ference with First Amendment rights, it cannot stand absent an overriding interest of the educational system. Here, it is the public policy of the state that teachers be allowed to form and join unions and that a school board may not discriminate against them for the exercise of this right.

The facts alleged by the teacher in her complaint, if true, would show a violation of the Taylor law. In view of this allegation and the allegation that the teacher was denied tenure solely in retaliation for the exercise of constitutional rights, the appellate court held that the complaint of the teacher did state a cause of action and should not have been dismissed by the trial court. In so holding, the court said that if the teacher possesses all the attributes of an excellent teacher but additionally arouses the displeasure of the school board merely because she is a union activist, tenure may not be denied her on that ground. But it does not hold, the court said, that union activity provides shelter for a teacher whom the board decides not to retain for bona fide legitimate reasons. The decision was reversed and the matter remanded for a hearing on the merits.

Ohio

Orr v. Trinter
444 F.2d 128
United States Court of Appeals, Sixth Circuit,
June 16, 1971. Writ of certiorari denied, United States Supreme Court, June 29, 1972
(41 U.S. Law Week 3002).

A probationary high-school teacher whose contract was not renewed brought suit under the federal civil rights act against the Columbus, Ohio, school board, seeking a statement of reasons for the nonrenewal and a hearing on those reasons. His complaint alleged that his constitutional rights were violated by failure of the board to renew his contract without giving him reasons, hearing, or other due process rights. The trial court granted the relief (318 F.Supp. 1041), and the school district appealed.

The question presented on appeal was whether a nontenure teacher whose employment contract is not renewed has a constitutional right to be apprised of the reasons and to be given a hearing. The appellate court reviewed cases from other federal circuit courts and noted that they are split on the question. Some courts have held that where the teacher has "an expectancy of reemployment," he must be given notice and a hearing. The appellate court said that it was not clear that the teacher in the instant case had an expectancy of re-employment under the Ohio teacher tenure law. Since the teacher filed this lawsuit, the court assumed he had a personal desire and expectation to continue in his employment as a teacher in the school system. In this regard, the court said: "Personal desire and expectation, however, are not the equivalent of expectancy of reemployment in contemplation of the law. Whatever expectancy of employment [the teacher] may have had during his probationary period and prior to attaining tenure status was not subject to constitutional protection, but was subject to the discretion of the Board of Education not to renew his contract."

The appellate court also stated that while there is no constitutional right to public employment, termination may not be for constitutionally impermissible reasons such as race, religion, or free speech. However, there was no allegation here that this was the case.

Summarizing what it considered to be the law relating to the issue before it, the court said that to sustain a claim under the civil rights act the teacher would have to prove that the action taken was under color of state law and that the action resulted in the deprivation of a constitutional right. Although it was clear that the nonrenewal action was under color of state law, the court did not agree that it resulted in the deprivation of a constitutional right. First, the teacher did not complain that he was dismissed because of his exercise of a constitutional right of free speech or right against self-incrimination, or because of racial discrimination. Secondly, the court said that "in the unique situation of a probationary school teacher, the failure to give reasons for the refusal to rehire is not arbitrary and capricious action on the part of the Board since the very reason for the probationary period is to give the Board a chance to evaluate the teacher without making a commitment to rehire him." The court ruled that the interest of a probationary teacher in knowing the reasons for nonrenewal was not great enough to outweigh the interest of the board in free and independent action with respect to probationary teachers.

The court held that it was neither arbitrary nor capricious to refuse to renew the teacher's contract without giving him a reason. Accordingly, the decision of the trial court was reversed with instructions to dismiss the complaint.

NOTE: The Supreme Court of the United States denied a writ of certiorari for a review of this decision.

Pennsylvania

Nicolella v. School Board of the Trinity Area School District, Washington County
281 A.2d 832
Supreme Court of Pennsylvania,
October 12, 1971.

A nontenure teacher appealed from the lower court denial of a writ of mandamus to compel the school board to reinstate him. He had been hired in 1966 under a two-year temporary professional employee contract which was to continue in effect until the expiration of two years of satisfactory service unless terminated by the teacher on 60 days' notice or by the school board pursuant to state law. At the end of his first semester the teacher was rated satisfactory. However, in May 1967, the teacher was informed that he had been rated unsatisfactory, and in June was notified that in view of his unsatisfactory rating, his over-all rating for the year was unsatisfactory. That same month the teacher was informed that because of the rating, the school board had voted to terminate his contract, but that he would be heard if he so requested. At the teacher's request a hearing was held, after which the board voted to reaffirm its decision.

The teacher then filed his complaint, seeking to compel his reinstatement for the remainder of the two-year period and procurement of tenure unless he again received an unsatisfactory rating. He also alleged that he could be discharged only according to the procedures of section 514 of the school code. The board argued that mandamus was not the proper action to be brought, that section 514 applied only to permanent employees, and that section 1108 applicable to probationary employees empowered the board in good faith to discharge a temporary employee after an unsatisfactory rating.

At the trial the teacher presented testimony concerning animosity toward him by the principal and vice-principal and attempted to suggest that discharge was due to union activities. The trial court concluded that no basis existed for a finding of bad faith on the part of the school board and granted the motion of the board to dismiss the action.

On appeal the teacher argued that mandamus was the proper action to be brought to restore him to the position from which he was illegally removed. The appellate court disagreed, saying that mandamus will lie when there is a clear legal right in the plaintiff and a corresponding duty in the defendant. Finding neither present in this case, the court held that section 1108 relating to temporary employees was the proper section to be applied. The court said that under state law, an unsatisfactory rating was the only prerequisite necessary for dismissal of a nontenure employee absent a showing of bad faith. The trial court specifically found that the unsatisfactory rating had been made in good faith. The appellate court held that this finding was amply supported by the record, and accordingly, the teacher's discharge was proper. The action of mandamus, therefore, was not appropriate. The decision of the trial court against the teacher was affirmed.

Virginia

Helliman v. Martin
330 F.Supp. 1
United States District Court, W.D. Virginia,
Roanoke Division, June 21, 1971.

A probationary teacher at Radford College brought suit against the Board of Visitors to compel them to reinstate her to her teaching position and to award her damages for the allegedly illegal nonretention. The teacher had been employed at the college since the 1965-66 school year and each spring until February 1969 she received a letter offering her continued employment and advising her that she was still operating under the 1940 American Association of University Professors' Statement of Principles on Academic Freedom and Tenure. In February 1969, she was notified that she would not be offered a contract for the 1970-71 school year. A few days later the teacher responded to the oral reasons given for the nonrenewal of her contract. She appealed to the committee on tenure to reconsider its decision. On reconsideration, the committee reaffirmed the nonrenewal. At no time did the teacher receive written notice of the reasons for her nonretention, nor did she have an opportunity to appear personally and offer evidence in her own behalf.

At the point that suit was brought, the teacher had exhausted all possible remedies within the academic community. In her suit the teacher contended that she was the victim of "arbitrary, malicious, and unfounded employment practices which violate her rights and privileges guaranteed by the Constitution of the United States." She further alleged that the actions of the board were designed to intimidate her and others in the exercise of their constitutional rights. The teacher also claimed that she had a right to a full evidentiary adversary hearing concerning the reasons for her nonretention in accordance with the principles of due process. The school officials claimed that their actions were in complete conformity with the

teacher's contract and the law, and that since she was a probationary teacher, she had no right to continued employment and could be dismissed at the end of the contract period without reasons or a hearing.

The question before the court was what was required by due process in the case of a probationary college teacher. While the court found it undisputed that a college could not refuse to rehire the teacher for constitutionally impermissible reasons such as race, religion, or political affiliation, whether the decision could be made for arbitrary reasons or for no reasons was less clear. In reviewing decisions of the Court of Appeals for the Fourth Circuit, the district court said that it appeared that the higher court clearly recognized that "even in the situation of a teacher hired from year to year at the discretion of the hiring body, due process guarantees that one must not be arbitrarily deprived of his constitutional rights. The exercise of discretion concerning a teacher's nonretention must be based on the exercise of judgment, not bias or capriciousness, and his termination certainly must not be in retaliation for the exercise of any constitutionally protected rights by the teacher. Such a judgment must be based on fact and supported by reasoned analysis."

The court then attempted to balance the relative rights of the parties in order to ascertain the requirements of due process. The court said that the teacher had a private right to pursue her profession and that dismissal by the college would create serious difficulties in the teacher's reputation and future academic career. However, the college had an interest in bringing together a faculty of the highest possible competency and in not retaining probationary employees who do not meet this level of competency.

Having decided that under the due process clause, a college could not base its decision not to retain a teacher, even a probationary teacher, on grounds wholly unsupported in fact or totally without reason, the court said that for probationary teachers it would accept a standard considerably less severe than the standard of "cause" applicable to dismissal of tenure teachers. Colleges would still have discretion in hiring, retaining, or severing connections with probationary teachers, but what was required, the court said, was that this discretion be exercised based on facts and reasoned analysis. While the court felt that it might have been preferable for the college to furnish written reasons to the teacher for nonretention, and to allow the teacher to appear before the appropriate body to clear up any factual disputes, the court concluded that the teacher had no absolute right to such procedures. Differing from the conclusion reached in *Roth v. Board of State Colleges* (310 F.Supp. 972), the court followed the decision in *Hodgen v. Noland* (435 F.2d 859, 4th Cir. (1970)), holding that a public employee was not entitled to a formal notice of charges and a formal hearing before dismissal. Accordingly, the court held that a nontenured teacher "only has a right to a statement of reasons for his nonretention in that he has a right not to be discharged for an improper reason or for no reason at all." At some point, reasons must be furnished, but there is no constitutional right to receive them during the administrative process. If, when brought into court, the college still refused to give any reason for its action, the teacher would be ordered reinstated.

In this instance the oral reasons given for the nonretention were that the teacher's teaching was adequate but only adequate, that she was not sufficiently involved in campus affairs, and that she had failed to exhibit signs of professional growth by either pursuing a doctoral degree or by publishing. The court felt that if these reasons were substantiated, it would perhaps justify the nonretention of the teacher. There was a real dispute of the facts concerning the first two reasons but none regarding the third. Notwithstanding this third reason, the court said that an otherwise justifiable ground could not be used as a defense if it was a mere pretext and not the moving ground for the nonretention. Accordingly, the court held that the teacher had the right to present to a jury her allegation that the firing was actually occasioned by the exercise of some constitutionally protected right or to cover some other improper reason.

On the issue of damages, the court found no evidence that the college officials had acted maliciously; therefore, the teacher was denied damages.

Johnson v. Fraley
327 F.Supp. 471
United States District Court, W.D. Virginia, Abingdon Division, May 21, 1971.

A nontenure teacher brought suit under the federal civil rights act, charging that the failure to renew her contract was arbitrary and evidenced a willful and wanton disregard of her rights. This charge was based on the failure of the Russell County school board, which had employed her for many years, to furnish her with a written statement of reasons for nonrenewal and an opportunity for a hearing on those reasons. She alleged that a hearing was mandatory under the written personnel policies of the school board and

that the failure to renew her contract had damaged her professional reputation and impaired her ability to earn a living. The teacher further claimed that the action deprived her of the right to due process under the Fourteenth Amendment. She sought reinstatement and damages.

The school board admitted that the teacher was not furnished written reasons for the action, but alleged that the teacher had never demanded a hearing and denied that the school board operated under the personnel policies alleged to have been breached. The school board urged that in any event, the teacher had not been denied any due process or substantive rights secured by the Constitution since she was a nontenure teacher with no inherent right to renewal of her yearly contract, and since dismissal was not alleged to be for any impermissible constitutional grounds, such as race, assertion of freedom of speech or other guaranteed rights.

The court was of the opinion that the case was controlled by *Kirker v. Moore*, 436 F.2d 423 (4th Cir. 1971), a decision by the appellate court for the circuit, which held that nontenure employees of the West Virginia State Road Commission were not protected by the due process clause, and no federal constitutional right was violated when they were summarily fired. Finding the present case indistinguishable, the court held here that no federally protected right of the teacher had been violated. The only federally protected right claimed by the teacher was protection from discharge except for cause and an administrative hearing prior to termination of employment. The court did not agree that this constituted a protected right. Whether the teacher was entitled to a hearing under the personnel policies of the school board or under state law was not at issue since this would be a state and not a federal case. Since no federal claim was stated, the court dismissed the complaint for want of federal jurisdiction.

Wisconsin

Derby v. University of Wisconsin
325 F.Supp. 163
United States District Court, E.D. Wisconsin,
April 14, 1971.

A nontenured instructor at the University of Wisconsin, Parkside campus, sought a preliminary injunction against the nonrenewal of his contract. He alleged that in May 1968 he was notified that his employment would be terminated in June 1969. He was permitted to teach on a part-time basis during the 1969-70 school year, at the end of which his employment was terminated. The instructor alleged that his dismissal was without "any reason, justification of any sort or basis in fact" and that he had been denied procedural due process by the failure of the university to grant him a hearing. He further alleged that he was deprived of his "expectancy of continued employment" and sought reinstatement and damages.

To obtain a preliminary injunction, there must be a strong showing that the plaintiff would prevail on the merits of the case. The court found this showing to be lacking in this instance mainly because the instructor made no claim that he was discharged for reasons relating to First Amendment rights. Despite decisions that have granted nontenured teachers a hearing on nonrenewal, the court here noted that there was an impressive list of decisions to the contrary. Additionally, the court noted that the instructor sought monetary damages which could be granted only against a "person," and since it appeared that the board of regents acted only in a representative capacity, it was unlikely that an action for damages could be sustained against the members in their individual capacities. Accordingly, the motion for a preliminary injunction was denied.

Henson v. City of St. Francis
322 F.Supp. 1034
United States District Court, E.D. Wisconsin,
November 30, 1970.

Three nontenure teachers and the local education association brought a civil rights action against the school district, charging that the contracts of the teachers were not renewed "without any lawful reason and without any lawful basis in fact." Before the court was the motion of the school district to dismiss for lack of personal and subject-matter jurisdiction and because the complaint failed to state a cause of action.

The court dismissed the action as to the school-board members in their individual capacities and also dismissed the teachers' claim for damages against the board and the school district because these defendants were not "persons" within the meaning of the federal civil rights statute. However, the claim for equitable relief was heard.

It appeared that the teachers had each been granted a private hearing before the school board but that their requests for written reasons for the nonrenewal of their contracts had been denied. This denial constituted the gist of their complaint. They urged that as a matter of constitutional right they were entitled to a statement of reasons for nonretention and a hearing thereon. The court found cases, among them *Roth* and *Gouge*, from

another federal district court in Wisconsin, that supported the argument of the teachers but also found "an impressive line of cases which holds that a school board's authority not to rehire a nontenured teacher is unrestricted so long as the reasons for non-retention are not based on constitutionally impermissible grounds." The court, however, deemed it unnecessary to select one line of authority to reach a decision in this instance, since the court found that the record here disclosed that ample procedural due process was in fact afforded the teachers. The school board had complied with the applicable statute and had given the teachers a hearing. Also, while the complaint of the teachers did not state affirmatively that the reasons for nonretention were given *orally*, the court said this conclusion is irresistible from the fact that the issue raised in the complaint was the school board's refusal to supply *written* reasons.

It was the opinion of the court that procedural due process did not require written notification of the reasons for nonretention, and that the teachers had orally received reasons for nonretention. For these reasons, the case was dismissed.

Roth v. Board of Regents of State Colleges
446 F.2d 806
United States Court of Appeals, Seventh Circuit, July 1, 1971. Certiorari granted, 92 S.Ct. 227, October 26, 1971.

(See *Teacher's Day in Court: Review of 1970*, p. 46.)

The board of regents appealed from a district court order that directed it to either rehire a nontenured professor or to give him a statement of reasons for his nonretention and a hearing on those reasons. The district court had ruled that to safeguard due process rights, "the decision not to retain a professor employed by a state university may not rest on a basis wholly unsupported in fact, or on a basis wholly without reason." Further, that the "standard is intended to be considerably less severe than the standard of 'cause' as the latter has been applied to professors with tenure."

On appeal, the board did not question that a teacher could not be terminated for the exercise of a constitutional right, but said that it was for this professor to prove that he had not been re-employed for this reason, which the board denied.

The question on appeal was whether the state university must shoulder the burden of exposing the reasons on which its decision not to retain the professor was predicated and to that extent demonstrate that its reasons were not impermissible, or whether the professor must initially attempt to establish in court that the reasons were impermissible. The district court had balanced the interests of the professor in retaining his position against the interests of the university in preserving the educational system and concluded that the balance was with the professor.

The appellate court was of the opinion that the district court "properly considered the substantial adverse effect non-retention is likely to have upon the career interest of an individual professor and concluded, after balancing it against the governmental interest in unembarrassed exercise of discretion in pruning a faculty, that affording the professor a glimpse at the reasons and a minimal opportunity to test them is an appropriate protection."

The appellate court also noted that this case arose after serious disturbances on campus and expressions of opinion by the professor critical of the administration. It appeared that these expressions were considered by the board of regents "albeit in a context of supposed relevancy to his performance of his duties." Although the decision of the district court would apply in all nonretention decisions, an additional reason for affirming it, in the view of the appellate court, in cases such as this "with a background of controversy and unwelcome expressions of opinion, is that it serves as a prophylactic against non-retention decisions improperly motivated by exercise of protected rights."

The decision of the district court in favor of the professor was affirmed.

NOTE: An appeal from this decision was heard by the Supreme Court of the United States in January 1972. On June 29, 1972, the Supreme Court decided 5 to 3 that a nontenure teacher employed under a one-year contract has no constitutional right to a statement of reasons and a hearing on the state's decision not to rehire him unless he can show that the nonrenewal deprived him of an interest in "liberty" or that he had a "property" interest in continued employment, despite the lack of tenure or a formal contract.

The Supreme Court said that the interests of liberty would be implicated and the requirements of due process would apply where the state, in declining to rehire a teacher, makes any charges against him "that might seriously damage his standing and associations in the community" or imposes on him "a stigma or other disability that forecloses his freedom to take advantage of other employment opportunities." Further, procedural due process safeguards would be applicable where the

teacher's property interest in employment supports a legitimate claim for entitlement to re-employment. The Supreme Court concluded that since the teacher in this case had not shown that he was deprived of liberty or property protected by the Fourteenth Amendment, summary judgment in his favor on the issue of procedural due process should not have been granted.

Accordingly, the decision of the U.S. Seventh Circuit Court of Appeals was reversed and the case remanded for further proceedings consistent with this opinion. (40 U.S. Law Week 5079)

SCHOOL DESEGREGATION

THE CASE DIGESTS reported here under this heading are limited to cases where the teachers themselves are litigants. In addition, there are a number of other 1971 court cases initiated by public-school students for school desegregation which contain issues relative to assignment, demotion, retention, and reduction of teaching staff in the process of converting a dual school system into a unitary school system. These school desegregation cases are not part of this publication.

Alabama

Horton v. Lawrence County Board of Education
320 F.Supp. 790
United States District Court, N.D. Alabama, Northeastern Division, December 30, 1970.

As part of a school desegregation case the district court considered the hiring and promotion practices of the school board. The black pupils who had first brought suit charged that the school board used a quota system to block employment of new black teachers and that it had refused to rehire a black teacher because of racial prejudice.

The court found that the school board was using a quota system in hiring new teachers because of the wording of the previous court order directing that the percentage of black teachers in each school mirror that of the percentage of black pupils in each school. Accordingly, the court modified the order to provide that the ratio of black teachers and staff to white teachers and staff in each school be the same as each such ratio is to teachers and staff in the entire system.

The court found to be without substance the specific charge that one teacher was not rehired because of race, for in fact she resigned to take maternity leave and was not rehired because of a negative recommendation from her principal.

Another complaint by the pupil-plaintiffs was that the board had not selected staff members for demotion on objective, reasonable, and nondiscriminatory standards, citing evidence that a black coach had lost his coaching supplement on integration and that former black high-school principals were demoted and were now making less salary. The school board admitted that it had not employed objective and reasonable standards to determine what principals would not be retained as principals, but alleged that since the situation arose because of court-ordered conversion to a unitary system, it was not required to do so. The court held that this approach clearly contravened the spirit of the court order in this case and of the *Singleton* requirements. What the board should have done was to consider all high-school principals in the system for the remaining high-school principalships. Those persons demoted as a result of this evaluation must be given preferential rights on future vacancies.

In determining what relief was appropriate, the court noted that the former coach had waived any right of first refusal to regain the coaching supplement since he had stated that he did not wish to be a coach. However, if he wished to indicate his interest in further coaching assignments, he would be entitled to consideration without regard to race. As to the two principals who were demoted, the court directed that they receive for the 1970-71 school year the salary that they would have received if they had not been demoted, and that they be given preferential rights for the next high-school principal vacancies. One of these principals was then also employed as an instructor at night in the county vocational school. The court ruled that this principal was not to receive back pay for any periods for which he received compensation as an instructor at the vocational school.

Horton v. Lawrence County Board of Education
449 F.2d 793
United States Court of Appeals, Fifth Circuit, October 19, 1971.

(See case immediately above.)

An appeal was taken by the plaintiffs from the decision in the case above concerning one black principal who was demoted. The issue was whether or not in making the back pay award the district court should have deducted the pay received by the former principal from his position as an instructor at night in the county vocational school. The plaintiffs asserted that this salary was from a secondary job totally unrelated to his school district employment. The appellate court held that if this contention was true, the salary received from the secondary job should not have been considered. However, the issue of whether the two jobs were related or separate was a question of fact to be determined by the district court. Accordingly, the case was remanded to the district court for findings of fact on this issue.

Lee v. Macon County Board of Education
321 F.Supp. 1
United States District Court,
N.D. Alabama, S.D., January 4, 1971.

Pursuant to a school desegregation order, the Limestone County Board of Education was directed to close five schools for the 1970-71 school year. The court order also required the board to develop and make public "objective and reasonable nondiscriminatory standards" governing the demotion of persons as a result of the desegregation of the school system. In fact, no standards were used by the school board and the five principals of the closed schools all lost their jobs. Four of the closed schools were black and one was white. It was the contention of the board that it was not required to utilize the standards for demotion because no vacancies arose in the school system. One vacancy did arise by resignation of a white principal and was filled with a new white principal, but the school board maintained that this position was filled *prior* to receipt of the court order.

The court noted that although the one vacancy may have been filled prior to receipt of the court order, at that time (spring 1970) the school board was aware that some schools would be closed for the next school year and should have known that there was no need to hire a new principal. The court held that the board should have evaluated all of the 16 principals in the system and chosen the 12 to be retained. The four not selected then would have "a limited preferential right to promotion in the event of subsequent vacancies."

The court directed that the new principal be reassigned within the system without any reduction in salary. The court also directed that one of the demoted black principals be appointed to the vacant position and that the remaining demoted principals who had chosen to stay in the Limestone County system be offered the next three vacancies in the system. In the meantime, the court ordered that they all be paid, as a salary supplement, the difference between the salary they were receiving and the salary they would have received had they remained as principals until such time as they were offered a promotion back to principal.

In addition, the court found that the school board discriminated in hiring new teachers in the mistaken belief that the faculty racial ratio must be the same as the student racial ratio. Accordingly, the board was ordered to cease using any racial quota in the hiring of employees and to furnish to other parties to the litigation semi-annual reports showing the vacancies to be filled; the qualifications necessary for the position; and the racial and educational characteristics and experience of the applicants, including an indication of who was hired.

Mills v. Birmingham Board of Education
449 F.2d 902
United States Court of Appeals, Fifth Circuit,
September 27, 1971; rehearing and rehearing
En Banc denied, November 8, 1971.

A Birmingham, Alabama, school teacher sought to have her transfer to another school enjoined. She had been transferred pursuant to a court-ordered desegregation plan. When she refused to accept her teaching assignment for the 1970-71 school year, the school board notified her that her employment was terminated. The teacher then brought suit in state court, seeking an injunction to bar her transfer. The injunction was issued.

The school board then removed the case from state court to federal district court on the ground that the purpose and effect of the suit was the nullification and circumvention of the federal court desegregation order. The federal district court dismissed the suit and the teacher appealed.

The appellate court ruled that insofar as the teacher sought injunctive relief that would have prevented the school board's strict compliance with the faculty desegregation order, the federal district court was correct in dismissing the action. In this regard, the court said the school board had a duty to comply with the constitutional mandate of the *Singleton* decree that could not be avoided through the use of any local tenure or teacher hiring security statutes.

In her complaint the teacher also charged that her transfer was not necessary for compliance with the desegregation order but was made for political

or personal reasons in violation of the state tenure law. In addition to the injunction, the teacher also sought reinstatement and back pay for the 1970-71 school year. The appellate court held that if the teacher could show that her transfer was made for personal or political reasons in violation of state law rather than for the purpose of faculty desegregation, she would establish a right to reinstatement and possibly back pay. The case was remanded to the district court to determine if the teacher was transferred for the reasons that she alleged.

Arkansas

Moore v. Board of Education of Chidester School District No. 59, Chidester, Arkansas
448 F.2d 709
United States Court of Appeals, Eighth Circuit,
September 13, 1971.

Four black teachers who were not rehired following integration of the schools brought an action under the federal civil rights statute against the school district. The district court dismissed the complaint, and the teachers appealed.

The school district had historically operated a dual school system until the 1969-70 school year. That year the district consolidated its two schools with a resulting reduction in faculty. Five black teachers, including the four plaintiffs, were not offered new contracts. All white teachers were offered new contracts.

The district court had proceeded on the basis that the teachers had the burden of proving that their dismissals were discriminatory. The appellate court held that this was incorrect. For where school districts have a long history of segregation, they must show by "clear and convincing" proof that the dismissal of black teachers was not unlawfully discriminatory. The failure of the district court to properly assign the burden of proof would be grounds for remand unless the appellate court was satisfied that the school board had met the burden of proof. The court was not satisfied in this case, and in addition, there were other sound reasons for reversing the trial court. First, the appellate court found that some teachers had voluntarily declined to renew their contracts, and the board did not offer any of the dismissed black teachers the opportunity to fill any of the vacancies arising out of these resignations. While this court had not previously ruled directly on the obligation of a school board to do so, other federal appellate courts have ruled under these circumstances that a dismissed teacher be given the first opportunity to fill a vacancy for which he is qualified, even if the dismissal was based on nondiscriminatory standards applied in a nondiscriminatory way. In the view of this court, that rule is a sound one and would be applied to two of the four teachers. In the first case, the teacher was qualified for one of the vacancies which was filled by a teacher with less experience. In the second instance, the vacancy was outside the teacher's certification area, but it was common practice within the district for teachers to teach outside their areas of state certification. The appellate court held that these two teachers were racially discriminated against when they were not offered positions with the school district. The court also held that if the school district wished to require teachers to be certified in the area they were to teach, such requirement must apply to all teachers then within the system.

The court also found that the other two teachers were discriminated against. The court said that a school board in integrating its schools should make provision for a plan governing the assignment and dismissal of teachers, with standards for and procedures for evaluating teachers. Because this school district is quite small, it could have an informal procedure, but it must have some method of evaluating teachers, using definite nondiscriminatory standards before dismissing any of the teachers.

The court made it clear that a school board is obligated to use objective nondiscriminatory standards in the employment, assignment, and dismissal of teachers and could also use previously announced nondiscriminatory subjective factors, but race per se, including other euphemistic references such as environment and speech patterns would be an impermissible criterion. The school board in this case contended that it did have the required standards. However, the court held that they were not applied in a nondiscriminatory manner to the two teachers. The board argued that one of the teachers lacked the requisite minimum qualification for a teaching position in the school and that she did not have a regular state teaching certificate. This was correct, but both before and after integration the board employed white teachers who did not have state certification. Thus, it should have given the black teacher an opportunity to continue teaching in the system until it had adopted a nondiscriminatory policy against hiring noncertificated teachers or alternatively given such teachers a reasonable time to obtain the necessary certification.

As to the remaining teacher, the board argued that she would not be a proper moral influence upon the children. The charges against her were her pregnancy and her financial situation. The court noted that even if the board's allegations were

based on fact, its decision to dismiss this teacher would still discriminate unlawfully. The teacher's pregnancy was well known at the time she taught at the all-black school, and if complaints against her were not such as to require action against her at that point, the court said, they could not be a valid basis for refusal of employment at an integrated school. Additionally, there was evidence that other teachers had the same financial problems. The court also found that in dismissing this teacher the board rested its decision on insufficient evidence and had relied on "gossip" for its information, rather than conducting an independent investigation and giving the teacher an opportunity to dispute the charges. To protect the rights of black teachers during school integration, the court stated, a board should notify the teachers of any charges against them and give them an opportunity to meet such charges.

The appellate court concluded that the board unlawfully discriminated against all four of the plaintiff-teachers. Accordingly, the case was remanded to the district court with directions that it order the board to notify the four teachers of present and future vacancies within the system and to offer such positions to them without comparing them with other applicants. If the teacher does not accept the first offered vacancy, he is not to be entitled to preferential consideration for subsequent vacancies. The board may further require noncertificated teachers to obtain a certificate within a reasonable time after reinstatement. The district court was also directed to determine the extent that each of the teachers was damaged and the amount of such damage.

Florida

Braxton v. Board of Public Instruction of Duval County, Florida
449 F.2d 158
United States Court of Appeals, Fifth Circuit, September 23, 1971.

This appeal involved an allegedly discriminatory transfer of a teacher. The teacher had been transferred along with other teachers as part of a general reassignment of faculty members pursuant to a court desegregation order. At the time this appeal was heard, the teacher had returned to her former position although for almost one year she had occupied a position of less responsibility. During that time she had not suffered any loss of salary, pension rights, or other emoluments.

The appellate court said that, even assuming arguendo that a wrong had occurred, there was no basis for concluding that the wrong would be repeated by the school system which was currently operating under the court desegregation order. Accordingly, the appellate court held that controversy no longer existed and remanded the case to the district court with directions that it be dismissed as moot.

Smith v. Board of Public Instruction of Pinellas County, Florida
438 F.2d 1209
United States Court of Appeals, Fifth Circuit, March 2, 1971. Certiorari denied, 92 S.Ct. 61, October 12, 1971.

(See page 35.)

Georgia

Rauls v. Baker County Georgia Board of Education
445 F.2d 825
United States Court of Appeals, Fifth Circuit, June 29, 1971.

Two black teachers appealed from the lower court refusal to enjoin their discharge. The teachers were being discharged under the claimed application of a faculty ratio.

The appellate court reversed the decision of the trial court because the requirements of the *Singleton* decree with regard to faculty desegregation were not followed in this attempted dismissal. The teachers were ordered reinstated for the 1970-71 school year with back pay.

Indiana

Burns v. Board of School Commissioners of the City of Indianapolis, Indiana
437 F.2d 1143
United States Court of Appeals, Seventh Circuit, January 22, 1971.

(See *Teacher's Day in Court: Review of 1969*, p. 33.)

Indianapolis teachers brought a state court action seeking to enjoin involuntary transfers of teaching personnel to achieve racial balance in the schools, and to rescind transfers previously made in compliance with a federal court school desegregation order. The state court issued the requested injunction. Thereafter, the school board had the action transferred to the federal court, which dissolved the restraining order of the state court and refused the request of the teachers to remand the

case to the state court. The teachers appealed from that decision.

The appellate court agreed with the judgment of the federal district court, and upheld the removal of the case from the state court, since the assignments complained of were made pursuant to the federal court's order. The appellate court also rejected the argument of the teachers that they were being involuntarily reassigned by the district court without any opportunity to defend their interests. The appellate court noted that the teachers had first sought to intervene in the federal school desegregation suit, and when this intervention was denied, they chose not to appeal. Having thus waived any error by their failure to appeal, the court said they could not now collaterally attack either the denial of their petition to intervene or the final judgment in the desegregation case. The decision of the federal district court was affirmed.

Louisiana

Smith v. Concordia Parish School Board
445 F.2d 285
United States Court of Appeals, Fifth Circuit,
June 15, 1971.

The school board appealed from a district court decision mandating racial ratios for teachers. That court had found that the board had neither developed nor used objective criteria in connection with a reduction in staff following integration and that the dismissal of black teachers was racially discriminatory. The appellate court held that neither of these findings was clearly erroneous. Nor did the appellate court find an abuse of discretion in the district court's establishment of racial ratios that would govern personnel changes until objective and reasonable nondiscriminatory standards were formulated. The decision of the district court was affirmed and the case remanded with directions that the district court require the school board to file semi-annual reports.

Mississippi

Armstead v. Starkville Municipal Separate School District
325 F.Supp. 560
United States District Court,
N.D. Mississippi, E.D., April 7, 1971.

The National Education Association, the Mississippi Teachers Association, and nine black teachers who had been employed by the Starkville school district brought suit alleging that the school district unlawfully refused to re-employ the teachers and refused to hire black applicants for positions. They sought a permanent injunction against the district to prevent it from enforcing Policy 13-69 requiring inservice teachers and applicants to achieve a certain score on the Graduate Record Examination (GRE) or a master's degree as a precondition to retention or employment in the school system. By a preliminary injunction, the teachers who had not obtained positions for the 1970-71 school year were ordered reinstated pending a trial on the merits.

During 1969-70, the student enrollment in the Starkville school system was 53 percent white and 47 percent black. Prior to a February 5, 1970, court desegregation order the system was organized on racial lines. One or two black teachers taught in the white schools, and 23 white teachers were employed in black schools. The four white schools were administered by white prinicpals, and the four black schools by three black principals and a black head teacher. The desegregation order mandated faculty integration according to the provisions of the *Singleton* decree. For the 1970-71 school year, 43 faculty positions were eliminated, with the reduction being racially disproportionate. Additionally, 32 new teachers were hired; all were white. The number of black administrators decreased to one. The school board maintained that the racial imbalance of the faculty resulted from the implementation of its Policy 13-69.

Prior to the implementation of this policy, new teachers were hired on the basis of the information on their applications, comments of persons given as references, and results of an interview with the principal, who then recommended the applicant to the superintendent who in turn made recommendations to the board which made the final decision. Present teachers were retained mainly on the recommendation of their principal. The new policy which the board adopted while under pressure to integrate the school system required teachers hired prior to April 18, 1968, to obtain a combined GRE score of 640 or score in the 50th percentile or better, or have a master's degree. For teachers employed after April 18, 1968, the required GRE score was 750, or a 60th percentile ranking, or the master's degree, or a score of 500 on the commons section of the National Teacher Examination (NTE) and a score of 500 on the teaching field section. By taking the NTE a teacher would qualify only for provisional status and would still be required to take the GRE.

When this policy was being adopted, the assistant superintendent asked Mississippi State University, the only institution in Starkville, about its mini-

mum GRE scores for entrance into graduate school. The college required a 900 for regular admission and a 700 for provisional admission. The court found that as a practical matter the alternate master's degree in place of the minimum score was not a meaningful alternative since similar or higher scores were required for admission to graduate school. Similarl , the percentiles required were too high to constitute a meaningful alternative.

There was testimony from the Educational Testing Services, producers and administrators of the GRE to the effect that the test was designed to develop information about the academic preparation of students "to assist graduate schools and departments in the selection of qualified students for admission to graduate study, primarily for the doctorate" and was not designed or validated for use in the selection of teachers, or for the purposes of measuring a candidate's preparation for teaching or identifying those who are or will be competent teachers. No elementary or secondary school system other than Starkville has made such use of the test in hiring or retaining teachers. Moreover, the Starkville school superintendent testified that the GRE "had nothing to do with measuring teacher competency."

Additionally, there was evidence that the implementation of the policy had fallen more heavily on black teachers than on white teachers. The court noted that GRE scores of graduates of white institutions were higher than the scores of graduates of black institutions. The superintendent of schools had testified that he "expected Negroes to score more poorly than whites." There was evidence that at least 14 of the 25 teachers barred by the policy from continued employment had been recommended by their principals for re-employment. The nine plaintiffs in this suit had from one to 28 years of teaching experience, and prior to the adoption of the policy the school authorities found them to be satisfactory for re-employment.

In light of all of the facts the court concluded that the school board, in adopting the policy, knew or should have known that its implementation would bar more black than white teachers from re-employment and initial employment in the district. While it found it commendable that the school board sought means to improve the quality of teachers, the court said the means adopted may not be discriminatory. The court concluded that the school authorities had not shown by clear and convincing evidence that their failure to rehire black teachers or to hire black applicants was not racially discriminatory and that the cut-off scores established a racial classification which the school authorities had the burden to and failed to justify. Therefore, Policy 13-69 was an unconstitutional racial classification.

Further, the court found it "both unreasonable and discriminatory to use ostensibly neutral criteria for employment where those criteria are not substantially related to the job's requirements and where the criteria disqualify substantially more black applicants than white applicants." Accordingly, the court ruled that the use of the GRE violated the Fourteenth Amendment for the reason that the examinations are not job-related to the extent that they determine teacher competency, and because, as used, they disqualify a disproportionate number of black teachers and applicants. The court also found that the school board had violated the ratio requirements of the *Singleton* decree since vacancies in a system undergoing desegregation may not be filled with a person of a race different from that of the displaced person until displaced staff members have had an opportunity to fill the vacancy.

The court declared that Policy 13-69 was unconstitutional and enjoined the school officials from utilizing the GRE in the selection of inservice teachers for retention and the hiring of new applicants. Those plaintiff teachers who were not re-employed as a result of the policy were entitled to damages and re-employment. The school board was also directed to notify anyone who had been informed of the policy that it was no longer in effect and to enclose a copy of the court order. Any future changes in employment or retention policies were to be filed with the court 30 days prior to implementation.

NOTE: This decision was upheld by the U.S. Circuit Court of Appeals for the Fifth Circuit in a decision rendered in June 1972.

Armstead v. Starkville Municipal Separate School District
331 F.Supp. 567
United States District Court,
N.D. Mississippi, E.D., July 27, 1971.

(See case above under this title.)

A principal and three classroom teachers who were not re-employed by the Starkville school district brought a civil rights action against the district. The principal and one classroom teacher charged that the failure to re-employ them was because of their race and the exercise of their First Amendment rights. The remaining two teachers who were white charged that the failure to rehire them was because of the concern they exhibited

for the black community, in particular the children in their classes.

Prior to integration the principal had headed an all-black school. In 1965, while the schools were still segregated, a new superintendent had been employed who recommended the termination of the principal because he did not consider him qualified. The school board, asserting that it was acting in the interest of racial harmony in the district, continued the principal's employment through the 1969-70 school year. After the adoption of Policy 13-69 (see case above), the principal voiced disapproval of the policy and at a meeting with the school board said that "he would advise them to say their prayers and sleep with one eye open because somebody might burn down their homes." The board did not take this as a threat of the principal but thought the statement to be inappropriate and in bad taste and this was made known to him. Several other incidents also brought about reprimands of the principal by the superintendent. Following one of these conversations between the principal and the superintendent, the principal called the superintendent, requesting authority to leave his building so that he might look for employment elsewhere because he believed that the district would be better off without him and his wife. The superintendent told him he should think about what he had said because if he followed through with his plan, it would be considered a resignation. The principal left the building as he had planned. It was announced at the next principals' meeting that he had resigned and the position was open. The principal was present at this meeting and made no comment.

On considering the evidence, the court was not convinced that the resignation was a result of coercion. The court ruled that the principal had not met the burden of proof placed upon him to show that his separation was not voluntary.

The wife of the principal who was also involved in this suit, had been teaching in the all-black school in which her husband was principal. Prior to this assignment she taught in another school where she was unable to get along with the principal. She did not accept the fact that her husband resigned and contended that he was fired. To express her disapproval of the board's hiring policy of black teachers, she sent various documents, among them a picture and poem, to numerous persons, including the superintendent. The teacher was recommended for re-employment for the 1970-71 school year by the principal and the new superintendent. However, the school board failed to elect her, an action it rarely, if ever took, in the face of such recommendations. The members of the board testified that they knew her husband was leaving and that they feared trouble with a new principal. The court was of the opinion that the teacher's activities with regard to the documents was protected activity under the First Amendment and that she was not given an opportunity by the board to defend the charge that she was uncooperative with her former principal, but that the board seized upon the incident to deny her re-employment. Further, the teacher's long employment with the school system created an expectancy of continued re-employment. The rejection of the recommendations that she be re-employed, the court said, to some degree constituted retaliation for her criticism of the board's teacher-hiring policy. Since the board had already discharged the teacher on grounds which violated her constitutionally protected rights, rather than returning the matter to the board for further proceedings, the court held that she was entitled to judicial relief.

The two other teachers involved in this controversy were first-year white teachers who taught in all-black schools. Both were recommended for re-employment by their principals for the 1970-71 school year. Both were also active in the school and in school-related activities in the black community. Under a court-directed desegregation order the school board proposed to close three of the four black schools in the district, thereby causing overcrowding at the formerly white schools. One of these two teachers became quite upset at a faculty meeting when this plan was announced. Under the plan she and her class were to be transferred to a former white school. The new principal refused to accept her transfer because of the incident at the faculty meeting. Consequently the teacher was not re-employed.

The other white teacher was not recommended for re-employment by the superintendent because of the protest over the type and manner of an achievement test being administered to her third-grade class. The superintendent classified her conduct over the test as unprofessional. He did not afford her a hearing on charges of misconduct but summarily concluded that she should not be re-employed. Both teachers maintained that the incidents used not to re-employ them were shams and that the real reasons were their associations with and their activities in the black community.

Under Mississippi law the school board has authority to employ only those teachers who are recommended by the superintendent. Therefore, neither of these two teachers was ever considered by the school board. The court held that if in either case, "dismissal was occasioned, or even partially so, by their activities with the black students and

the black community, or by the exercise of the rights of expression or association, then their dismissal was unlawful and they are entitled to reinstatement and to recover damages occasioned thereby." The court found that the sole issues concerning the rights of the two white teachers grew out of the test incident in one case and the faculty meeting incident in the other case. Since the school board had not had an opportunity to act upon the dismissal of either teacher, it was directed to afford the teachers a hearing on the charges preferred against them by the superintendent and the principal. The court retained jurisdiction of this portion of the complaint until after the school board hearing.

Baker v. Columbus Municipal Separate School District
329 F.Supp. 706
United States District Court,
N.D. Mississippi, E.D., June 23, 1971.

The National Education Association, the Mississippi Teachers Association, and eight black teachers who were not rehired for the 1970-71 school year brought suit against the school district charging that the district unlawfully refused to rehire the eight teachers and refused to hire black applicants for teaching positions. The plaintiffs also sought a permanent injunction preventing the school district from requiring a score of 1000 or more on the National Teachers Examination (NTE) as a precondition for retention or initial employment, a policy adopted on January 12, 1970.

As of the 1969-70 school year the school system was 61 percent white and 39 percent black. Until 1970-71 the system was operated as a dual system. During the summer of 1970, the district was ordered to operate a unitary system immediately. The school authorities intended to reduce the size of the faculty by three positions in 1970-71, but prior to school opening there were 36 staff vacancies. Between 1969-70 and 1970-71 the number of black teachers on the faculty declined 22 percent while the number of white teachers declined 3 percent. All but one of the 44 new teachers hired for the 1970-71 school year were white.

Prior to January 12, 1970, the school district did not actively recruit new teachers, and retention of teachers was generally decided by the teacher's score on an evaluation form containing 25 items. A teacher who received a favorable evaluation from his principal was virtually assured of being reappointed. In 1966, the school district instituted a merit pay provision known as PEP. By this program a teacher earned points toward merit pay. Points could be earned by meeting minimum scores on the NTE, by earning credits toward an advanced degree, or by scoring high on the principal's evaluation. While theoretically it was possible to obtain merit pay without meeting the minimum score on the NTE, it was more likely that a teacher would earn merit pay by meeting the score. In the first three years of the PEP program 125 teachers received merit pay; all but four of these were white.

On January 12, 1970, the policy that was the subject of this lawsuit was instituted. This policy required first-year teachers and all new teachers to achieve a score of 1000 on the NTE to be eligible for retention or initial employment. At the trial, expert witnesses for both sides testified regarding the NTE. The court found that the examination was designed to measure the academic achievement of college seniors completing four years of teacher education, and that there was no evidence of any correlation, positive or negative, between the NTE score and effective teaching. The school district relied exclusively on the NTE as a means of hiring and retention. Care was not taken, the court found, to relate the score to the experience and needs of the school district or to guard against arbitrary results in using the cut-off score as a means of selecting teachers for re-employment or employment. The court also found that the NTE measures only 4 of the 25 criteria formerly used by the school district in evaluating teachers. Further, that it was unreasonable for the school district to utilize only the NTE as a means of deciding on new teachers.

The findings of the court also showed that the application of the policy resulted in disproportionate numbers of inservice black teachers not being retained as compared with inservice white teachers. Testimony indicated that black teachers could be expected to perform less well on the test than white teachers. A study of scores obtained by students at Mississippi institutions of higher education showed that 90 percent of the graduates of predominantly white institutions could be expected to achieve a score of 1000 on the test as compared with only 11 percent of the graduates of predominantly black institutions.

The court also found that the policy had been applied in a racially discriminatory manner in that one first-year white teacher who did not score 1000 was retained and two black teachers who were in their second year of teaching were not renewed for failure to meet the cut-off score although they should not have been included under the policy. Also, five black teachers who had applied for employment in the district were not hired although they had achieved a score of 1000. This

was done despite the fact that 36 vacancies existed in the district.

The court concluded that the school district knew that the application of the policy would bar more black teachers than white teachers from employment and retention, and in fact the cut-off score had this effect.

The second count of the teachers' complaint was that five of the teachers who were not retained because of the NTE score were also denied summer school employment in retaliation for bringing the law suit. The court found as fact that this allegation was true.

Under its conclusions of law, the court held that it was unconstitutional to discriminate on the basis of race in the hiring and retention of teachers in the public schools. In this instance, the school system had a long history of operation as a dual system, and in converting to a unitary system there had been a disproportionate decrease in the number of black teachers. This gave rise to a rather strong inference of racial discrimination. The court found the inference that the setting of the cut-off score was discriminatory was further reinforced by other facts. First, the school district knew from experience with the PEP program that more black teachers than white teachers would fail to achieve a score of >1000. Secondly, the requirement was applied in an unequal manner. Lastly, black teachers who had achieved 1000 on the test were not hired even though vacancies existed in the school system. This inference of racial discrimination could be rebutted by clear and convincing evidence which the court held the school district had not presented.

The court concluded that the school district, in formulating and applying the NTE cut-off score requirement, purposefully and deliberately discriminated against black teachers and black applicants because of their race. Since the school authorities had not discharged their "very heavy burden of justification" for their policy, the court concluded that the NTE cut-off score requirement was an unconstitutional racial classification. The court said further that the proof demonstrated that there was no "manifest relationship" between the test and teaching effectiveness. Moreover, the court concluded that apart from its discrimination aspects, the NTE cut-off requirement was an arbitrary and unreasonable qualification for re-employment or employment as a teacher in the Columbus school system and, therefore, violated the due process clause of the Fourteenth Amendment.

With regard to the second count of the complaint, the court held that the teachers were denied summer employment as a penalty for bringing the suit and consequently were entitled to damages. An appropriate order was to be entered at a later date specifying the relief that would be granted.

United States v. Tunica County School District
323 F.Supp. 1019
United States District Court, N.D. Mississippi, Delta Division, July 16, 1970.

By a supplemental complaint in a school desegregation case, the United States sought injunctive relief against the Tunica County school district, the state of Mississippi, and the state board of education for paying the second semester salaries out of public school funds for 19 white teachers who resigned rather than accept re-assignment. Consolidated for trial was a suit by black parents of the school district charging the school board with unlawfully allowing school books and other school property to be used in a private school by white students who left the public school system at the end of the first semester.

A previous school desegregation order for the county directed that not less than one out of every six classroom teachers in a school be of a different race. Prior to the entry of this order, the school board expected that faculty desegregation would be directed, and attached to each teacher's contract for the next year a provision stating that the teacher might be assigned to a school other than that shown on the contract, in which event the teacher had the right to terminate the contract. The school district then had 555 white and 3,155 black students. Prior to the opening of school for the 1969-70 school year, the district court desegregation plan was handed down, and the school board met with the teachers and informed them that they would be teaching at the school specified in their contracts.

The district court desegregation plan was overturned on appeal. Under a new plan, the school district was directed to assign faculty for the second semester so that the ratio of black to white teachers in each school was the same as each such ratio is to the teachers in the school system as a whole. Shortly after the reassignments were announced, all 19 white teachers in the system resigned. Not all of these teachers had been reassigned, but the school system became all-black following the court order, and the teachers refused to teach in an all-black school. At the beginning of the second semester the board paid to the teachers who had resigned their contract salaries for the remainder of the year. The same day the Tunica Church School opened with an all-white enrollment and an all-white faculty, including 18 of the 19 teachers who had resigned from the public school system.

The private school charged no tuition, and the teachers taught without pay. The students used the same textbooks which they had kept in their possession after leaving the public schools.

After the desegregation order but prior to the time the teachers were paid for the second semester, the school board had sought an opinion from the state attorney general on the legality of paying the teachers who refused their reassignments. The attorney general replied by citing a state law setting out the form for teacher's contracts and noting that the provision in the Tunica county contracts providing for reassignment in the event such became necessary because of the court order "had not been prescribed by the State Board of Education and was, therefore, unauthorized. Therefore, such language may be ignored in the determination of the right of the teacher." It was the opinion of the attorney general that the board had the legal right to pay a teacher who refuses reassignment during the middle of a school year but demands salary for the remainder of the school year.

The U.S. Government contended that the payments to the teachers were illegal because they were made for the purpose and effect of supporting a racially segregated private school contrary to the Constitution and in direct interference with the court's desegregation order. The school board denied that it had paid the teachers with this intent but rather that it had a legal and moral duty to pay the teachers.

The court noted that although the Tunica Church School operated for only one semester, it was an all-white, racially segregated school. Regardless of what the school board intended, the court held "the *effect* of its voluntary decision to pay salary balances to all teachers refusing reassignment was to furnish material aid to continuing segregated education in Tunica County by means of a private school." While the court had no doubt that the white students would have withdrawn even if the white teachers had continued to teach in the system and also that all or most of the 19 teachers would have likely resigned even if it meant loss of further salary, still the teachers could not have donated their services to the private school if the school board had not paid them. Under prior federal court decisions, the court said, agents of the state may not lend aid to support segregated private schools. The fact that the school board obtained a favorable ruling from the state attorney general could not shield it from the constitutional violation.

Regarding the school-board contention that it had a moral and legal duty to pay the teachers, the court found clear evidence that the board made the payments voluntarily, without legal demand or filing of suits by the teachers, despite the fact that 18 of the 19 teachers had clauses in their contracts stating that the board reserved the right to transfer them at a later date if the desegregation order required this, in which case the teachers retained the right to terminate their contracts. The court said that under the circumstances, it was unable to accept as a valid defense the board's sympathetic feelings for the white teachers who refused to accept reassignments. Actually, the board had the affirmative duty to terminate salary payments in such instances, for as is plainly spelled out in *Singleton*, teachers are required to accept new assignments "as a condition of continued employment."

The court concluded that the action of the board was an unconstitutional giving of state aid to support a segregated private school and that the ruling of the attorney general purporting to sanction the payments was itself infected with unconstitutionality and could not be relied upon by the school board to justify its unconstitutional action.

On the relief to be granted, the court held that since the schoolbooks had already been returned to the school system, that point was no longer at issue. With regard to the unconstitutional payments, the court directed that the defendants be required to take all reasonably necessary steps to recover the money from the teachers (an aggregate of more than $51,000) and if this was inadequate, the court reserved the right to adjudge personal liability for the money against the members of the school board who voted for the payments, the county school superintendent and those members of the state board of education who had personal knowledge of how the funds were being used.

CIVIL RIGHTS

Alabama

Ramsey v. Hopkins
320 F.Supp. 477
United States District Court, N.D. Alabama, Northeastern Division, December 21, 1970.

A black high-school teacher brought suit against Lawrence County school officials, alleging that his constitutional rights had been violated in connection with the termination of his employment. After teaching at a now closed school for two years, the teacher had been interviewed in July 1970 for a position in the same school system at the Lawrence County high school. At that time he was told by the school's principal that the high school had a rule against the wearing of mustaches. During the interview, the teacher did not indicate that his mustache was of great importance to him. In due time the teacher was appointed to the position for the 1970-71 school year and notified to report to the preschool teachers' institute. The teacher at this time was still wearing a mustache, but nothing was said about it. The following day, on reporting to school, the teacher was reminded of the no-mustache rule and asked by the principal to talk to the superintendent. He did so and was advised to remove his mustache. The teacher responded that he would consider the matter, and later telephoned the superintendent asking for a leave of absence to take courses at a college. This request was denied. The teacher then said he would resign. The following week the teacher, who had put off signing a written resignation, told the superintendent that he had changed his mind about resigning. He was then informed that the matter would have to be taken up by the board and that he had a right to appear and be heard. The teacher attended the meeting and waited for several hours while other business was discussed, but left prior to the time his case was reached. His employment was thereupon terminated for resignation, insubordination, and failure to cooperate. The following day the superintendent attempted to find the teacher a position at another school but none was available. The teacher's former position at the high school was filled by a black woman. No action was taken against another black teacher at the school who wore a mustache, the explanation being that his was less noticeable than plaintiff's.

The court found the teacher's claim of racial discrimination unconvincing, since no discrimination was shown in either the establishment or enforcement of the rule. This conclusion, the court said, was supported by the fact that the teacher who replaced the plaintiff and the other teacher wearing a mustache were both blacks. Nor did the court believe that the wearing of a mustache has been so appropriated as a cultural symbol by members of the black race as to make its suppression either an automatic badge of racial prejudice, or a necessary abridgement of First Amendment rights. The court was also unwilling to say that the procedure by which the board heard the case was in and of itself a denial of due process and equal protection of the law.

However, in looking into the reasons given for termination, the court found that the first reason given, the resignation of the teacher, was unsupported by the facts. The other reasons, insubordination and failure to cooperate, were found by the court to be merely labels for the teacher's failure to shave his mustache. In considering the no-mustache rule itself, which prevailed only in one high school in the system, the court said it was "a gross example of a rule based upon personal taste of an administrative official which is not a permissible base upon which to build rules for the organization of a public institution." The court found not the slightest argument or evidence to support the unwritten rule against mustaches. There was no indication that mustaches caused or were likely to cause any disruption or disturbance; in fact, the other teacher who wore a mustache had never been asked to remove it. The court held that the rule was unconstitutional and barred the board and the principal from enforcing it against this teacher or any other teacher.

Having ruled that the teacher had been subjected to an arbitrary, unreasonable, and capricious rule which violated his right to due process and equal protection of the law, the court considered the relief that should be granted. Since another

teacher had been employed to teach the plaintiff's classes for the semester, and the plaintiff was attending a special program to further his education, the court was of the opinion back pay or other monetary damages was inappropriate. Instead, the court directed that the teacher be offered another position in the school system beginning with the semester starting January 1971.

Arkansas

Arkansas Education Association v. Board of Education of Portland, Arkansas School District
446 F.2d 763
United States Court of Appeals, Eighth Circuit, July 26, 1971.

(See page 19.)

Cooley v. Board of Education of Forrest City School District, Forrest City, Arkansas
327 F.Supp. 454,
United States District Court, E.D. Arkansas, E.D., April 27, 1971.

(See page 57.)

Mitchell v. Alma School District No. 30
332 F.Supp. 473
United States District Court, W.D. Arkansas, Fort Smith Division, October 4, 1971.

(See page 24.)

Colorado

Colorado Civil Rights Commission v. State, School District No. 1, Bent County
488 F.2d 83
Colorado Court of Appeals, Division 1, August 10, 1971.

(See page 60.)

Connecticut

Hanover v. Northrup
325 F.Supp. 171
United States District Court, D. Connecticut, May 1, 1971.

An elementary-school teacher in Roxbury, Connecticut, sought a preliminary injunction to prevent the superintendent and the board of education from terminating her contract and to require them to reinstate her pending a final determination in the case. The teacher had been employed in the school system since September 1968. In December 1969, the board of education, at the instance of the new superintendent, directed that the Pledge to the Flag be part of the morning exercises in the elementary schools. The teacher had previously reached the conclusion that the phrase "with liberty and justice for all" was an untrue statement of present fact. She notified the principal of her refusal to recite or lead the Flag salute and arranged for a pupil to lead the class while she remained seated at her desk with her head bowed.

The superintendent ordered the teacher to lead the class in the Pledge, and when she refused to do so, she was suspended with pay. The board of education then held a hearing on the sole ground of insubordination because the teacher failed to obey the superintendent's order and voted to terminate her contract.

The court ruled that the refusal of the teacher to recite or lead the Pledge was a form of expression protected by the First Amendment which may not be forbidden at the risk of losing her job. The court found it of no consequence that her expression took the form of silence. The burden was on the school authorities to justify their restriction of expression on teachers. The court found no evidence to support the restriction, it being uncontroverted that the teacher's behavior caused no disruption nor did her behavior interfere with or deny the rights of other teachers or pupils.

The court found that the teacher was engaging in conduct protected by the First Amendment and that the school board had no justification for its attempted regulation of that conduct. The court was satisfied that the teacher had a strong possibility of ultimate success on the merits of this action and granted a preliminary injunction. The board of education and the superintendent were enjoined from terminating the teacher's contract during the pendency of the action and were directed to reinstate her immediately, pending final disposition of the action.

Georgia

Glover v. Daniel
318 F.Supp. 1070
United States District Court, N.D. Georgia, Newnan Division, August 7, 1969.

A black principal brought suit against officials of the Pike County schools, charging that the failure to renew his contract for the 1969-70 school year was for racial reasons in violation of his civil rights. The defendent superintendent testified that

the principal's contract was not renewed because to do so was "not in the best interest of the school" and "because of his lack of cooperation."

At the time the principal's contract was not renewed, the school system was in the process of desegregating. Prior to desegregation one of the black principals voluntarily resigned to take another position. He was replaced by a white principal. The principal in this suit disrupted the meeting at which the appointment was announced, and the black students in his school participated in a boycott which ultimately caused the newly appointed white principal to resign. One of the superintendent's examples of the principal's lack of cooperation was that he caused the boycott. From the circumstances presented, the court found that the principal either instigated or encouraged the boycott.

Other examples were that the principal failed to lock the doors and windows of the school at night with the result that three burglaries were committed, and that he failed to hold fire drills as required by state law. In both these instances the court found that while the principal was careless, these instances standing alone would not justify his discharge.

Additional examples presented by the superintendent were that the principal failed to attend meetings held at the State University in anticipation of desegregation. At one of the meetings a nongraded system was discussed which would necessitate the children in these grades being tested to determine their present level of achievement. When the time came to administer the tests in the principal's school, the students refused to take them. The principal testified that he was against the testing because he thought that standardized tests were racially biased. The court found that the principal had deliberately absented himself from the meetings where the tests were discussed, that it was important that he attend these meetings and that by deliberate action or non-action he sabotaged the tests. The court also found that the principal had disrupted a faculty meeting designed to select textbooks.

In view of its findings the court concluded that the principal had not shown that his discharge was for racial reasons. "Unquestionably, the First Amendment gives a teacher the right to speak his mind; but it does not give him the right to disrupt a school or to choose its principals or to sabotage its programs." The court concluded that it was the actions of the principal in these areas and not racial bias that brought about the termination of his contract. Accordingly, the complaint of the principal was dismissed. However, in the interest of future school and community harmony, the court directed that his position be filled by a black principal.

Louisiana

Carter v. Morehouse Parish School Board
441 F.2d 380
United States Court of Appeals, Fifth Circuit,
April 6, 1971; rehearing denied April 29, 1971.
Certiorari denied, 92 S.Ct. 201, October 19, 1971.

A black elementary-school teacher in an integrated school who was dismissed brought suit seeking reinstatement. She contended that her dismissal was racially motivated. The board of education had found her incompetent because she scored poorly on an achievement test intended for sixth-grade pupils. At the trial, during the testimony of the teacher's witnesses to the effect that in taking the test the teacher "was more or less playing around and it wasn't a teacher's test," the court interrupted to say that it considered this test an insufficient ground for dismissal, but that if there were proper grounds, the board could dismiss her. The attorney for the school board specifically asked if the board could take future action, and the court said yes. Therefore, none of the school-board witnesses was heard. In the court's final order, however, it was stated that the teacher's dismissal was racially motivated. The school board then appealed.

The appellate court ruled that the trial court erred in not hearing the evidence of the school board. For had the school board known the real basis of the court's proposed ruling, it might well have chosen to offer evidence in rebuttal. The appellate court said that a "ruling based on evidence which a party has not been allowed to confront or rebut is one which denies due process." The order of the district court was vacated and the case remanded.

The Supreme Court of the United States denied a writ of certiorari for a review of this decision.

Maryland

State v. Lundquist
278 A.2d 263
Court of Appeals of Maryland, June 14, 1971.

A social science teacher in the Anne Arundel County, Maryland, school system and his high-school student son in behalf of themselves and others similarly situated, challenged the recently enacted Maryland Flag salute statute. Basing its decision on *West Virginia Stat Board of Education v. Barnette* (63 S.Ct. 1178 (1943)), the trial court

held that the law violated the First Amendment right to free speech. The state appealed.

The law required that all students and teachers, except those objecting for religious reasons, to stand, salute the Flag, and recite in unison the Pledge of Allegiance. Failure to comply was punishable. The teacher maintained that he would refuse to engage in this mandatory Flag salute, not for religious reasons but because he could not "in good conscience" force patriotism upon his classes. He also objected to being forced to salute the Flag because he believed that this requirement eliminated his right to freely express his own loyalty to the United States. He testified that his son shared these views.

In *Barnette*, the Supreme Court of the United States held that the state may not require school children to salute and pledge allegiance to the Flag. However, on appeal the state of Maryland argued that this case was decided on religious grounds, and since the Maryland law contained a religious exemption, its constitutionality was not controlled by *Barnette*.

In an exhaustive review of *Barnette* and other decisions, the Maryland appellate court concluded that the result reached by the trial court was correct. It was the opinion of the Maryland appellate court that "*Barnette* was unequivocally decided as a question of free speech under the First Amendment; it is binding as such on this Court."

Going beyond *Barnette* and specifically considering *Tinker v. Des Moines Independent Community School District* (89 S.Ct. 733 (1969)), the Maryland court noted that the latter case had held silent protest permissible, absent a specific showing of material and substantial disruption to the work and discipline of the school. The court also observed that recent Flag salute and related cases had turned on this last distinction and not on the freedom of religion.

In conclusion, the court said: "Entertaining no doubt that there is ample authority to punish students or teachers who materially disrupt proper school activities, including voluntary patriotic programs, we are far from convinced that the mere refusal to participate in any phase of the Pledge of Allegiance ritual is punishable. To reach a contrary conclusion would allow the schools to discipline such refusal as 'an act of disrespect,' even though they may not compel this ceremony in the first place."

The court held the Maryland Flag salute law and its punishment provision to be unconstitutional and void not only under the dictates of *Barnette* and *Tinker* but also under the First and Fourteenth Amendments.

Mississippi

Rainey v. Jackson State College
435 F.2d 1031
United States Court of Appeals, Fifth Circuit,
December 22, 1970.

A college teacher brought a civil rights action alleging that he was discharged for constitutionally impermissible reasons. The district court dismissed the suit for lack of jurisdiction, and the teacher appealed.

The teacher had been employed by a private college in Mississippi when he testified as an expert witness for the defense in a case involving criminal obscenity against several persons because of the showing of a motion picture. The case and the teacher's testimony attracted extensive coverage by the news media. Consequently the board of trustees at the private college refused to grant the teacher tenure when offering him a contract for the 1970-71 school year. In February 1970, the teacher was designated a Woodrow Wilson Teaching Intern for the 1970-71 school year. This designation carries with it some prestige in the gaining of employment at predominantly black colleges and as well offering the black colleges some indication of qualified individuals willing to teach in a minority institution.

Jackson State College, a predominantly black institution, thereafter sent to the teacher a proposed contract for the 1970-71 school year as an assistant professor of English. The transmittal letter from the president asked the teacher to indicate acceptance by signing and returning the contract. This the teacher did and shortly afterwards rejected the offer of the private college for the renewal of his teaching contract for 1970-71. The teacher then taught two 1970 summer sessions at Jackson State.

During the summer the president submitted to the board of trustees his recommendations for employment of personnel for the 1970-71 year, including this teacher. The special education committee of the board of trustees concluded that the employment of the teacher would not be in the best interests of Jackson State College, and the entire board then passed a resolution eliminating his position and three others for the 1970-71 school year, stating as a reason the need to increase the campus security force. Through his attorney, the teacher requested the board to reverse its action and also requested a hearing. The board replied that it would not discuss the matter with the teacher. Suit was then brought.

After dismissal of the suit by the district court, the teacher sought a preliminary injunction from

the appellate court pending appeal. This was granted. The board of trustees failed to reinstate the teacher, insisting that all that was required was that his salary be paid. A clarification was then issued by the appellate court directing reinstatement to a teaching position.

The reason given by the district court in dismissing the action for lack of jurisdiction was that the teacher had not asserted a claim to a denial of a federally created right. That court held that there was no federal right to be employed by Jackson State College. The appellate court held that this interpretation misunderstood the nature of right being asserted. The teacher did not claim that he had a vested constitutional right to public employment in Mississippi, but rather that employment was being denied to him in retaliation for his assertion of his First Amendment right to freedom of speech. The appellate court ruled that since the complaint alleged that the college officials were denying him an opportunity for employment on constitutionally impermissible grounds, the teacher stated a cause of action and the district court did have jurisdiction to hear the case.

The college officials argued that at no time did the teacher have a valid contract with the college for 1970-71 since the president does not have the final authority to make employment contracts and that employment was not denied on unconstitutional grounds. The appellate court did not decide what relief, if any, the teacher might be entitled to, but did decide that he was entitled to his day in court. The college officials also argued that they had agreed to give the teacher a hearing, but that he declined to appear because the hearing was not set for an earlier date. The appellate court ruled that the teacher was not required to exhaust his administrative remedies prior to bringing a federal civil rights action.

The appellate court said this decision did not mean that every teacher employment problem is material for a federal law suit; rather, that under the facts of this case, the federal court did have jurisdiction and must proceed to hear the matter. The district court decision was reversed, and the case remanded for further proceedings on the merits with the temporary injunction left in force.

New York

Board of Higher Education of the City of New York v. State Division of Human Rights
321 N.Y.S.2d 229
Supreme Court of New York, Appellate Division, First Department, May 20, 1971.

The State Division of Human Rights appealed from the trial court order that it lacked jurisdiction to hold a public hearing on alleged discrimination in employment and promotion of faculty members at Queens College.

In reversing this decision, the appellate court noted that it had already been held that the State Division of Human Rights has jurisdiction in matters involving alleged discrimination in employment at Queens College. Should that Division overstep its bounds, exceed its jurisdiction, or make any illegal rulings, the court continued, the board of higher education was adequately protected by resort to administrative and judicial review.

Rhode Island

Ricciotti v. Warwick School Committee
319 F.Supp. 1006
United States District Court, D. Rhode Island, November 6, 1970.

A public-school teacher brought suit under the federal civil rights act, seeking reinstatement as head of the science department at Groton School. Before the court was the motion of the school committee to dismiss the action for lack of subject-matter jurisdiction.

In his complaint the teacher alleged these facts: The teacher applied for a vacant position as head of the science department at Groton junior high school, was interviewed by a committee, and was officially appointed on June 4, 1969. He served in that position for the 1969-70 school year and was reappointed for the 1970-71 school year at a higher salary. However, in June 1970, he was notified that he would be assigned as a junior high-school science teacher at a lower salary. At the time the teacher was initially appointed, there were two other similar positions vacant at other junior high schools. An unsuccessful applicant for one of the three vacancies filed a grievance via the teachers union with the school committee. The teacher-plaintiff was ordered to appear before the arbitration panel that heard the grievance. He complied with this request. The panel ultimately ruled in favor of the grievant who supplanted the plaintiff as head of the science department at Groton.

Jurisdiction under the federal civil rights act must be predicated upon deprivation under color of state law of a federal constitutional or statutory right, privilege, or immunity. Here, the teacher alleged that his Fourteenth Amendment substantive and procedural rights had been violated by the failure of the arbitration panel to give him an opportunity to obtain an attorney to represent him at the

hearing and by the panel's failure to allow him to present evidence or to cross-examine witnesses. The teacher also alleged that since the hearing was held under authority of the Rhode Island School Teachers' Arbitration Act, the action taken was "under color of state law" within the meaning of the federal civil rights act.

The sole argument advanced by the school committee in support of its motion to dismiss the action was that the teacher failed to exhaust his administrative remedy under state law, namely, the grievance procedure that had initially deprived him of his position. The teacher admitted that he did not resort to the procedure because to do so would be a waste of time. His reasons were that in view of the fact that the teachers union processed the grievance filed by the other teacher who was a union member, it could not be expected to represent him, a non-union member, as vigorously, since a decision in his favor would displace the union member teacher. State law gives the union exclusive authority to process these grievances. The teacher also argued that it was likely that the same three persons would make up the panel which would then have to reverse its recent prior decision to render a decision favorable to the plaintiff.

The court discussed the necessity of exhausting administrative remedies prior to bringing suit but did not decide the issue, finding that a decision was not critical to a decision on the motion to dismiss. The court did find that the teacher had alleged sufficient facts with sufficient particularity to raise some question concerning the futility and/or inadequacy of resorting to the arbitration remedy provided by state law. The court said that it was "not convinced to a legal certainty that he had an *adequate* State remedy, and if not, then the law is clear that he did not have to resort to that remedy." Accordingly, the motion of the school committee to dismiss the action was denied.

Texas

Montgomery v. White
320 F.Supp. 303
United States District Court, E.D. Texas, Tyler Division, October 24, 1969.

A teacher brought an action against the Tatum Independent School District, charging violation of his First Amendment rights. Before the court was the motion of the teacher for a directed verdict.

The teacher was not offered a contract for the 1968-69 school year, at least in part, because of his violation of a regulation of the school district that prohibited all political activity by teachers except voting. This was contrary to a Texas statute which provided that no school district could directly or indirectly coerce any teacher to refrain from participating in the political affairs of his community, state, or nation. When the school district was made aware of this statute, it amended its regulation, but at the time the teacher was refused a contract, the regulation was in full force and effect.

The court held as a matter of law that the school district had unreasonably, arbitrarily, and discriminatorily violated the teacher's rights in not fairly considering him for public employment. The court said that "simply because teachers are on the public payroll does not make them second-class citizens with regard to their constitutional rights." The court found that the complete ban on the right of teachers to express political opinions and engage in political activity is inconsistent with the First Amendment guarantee of freedom of speech, press, assembly, and petition. The teacher's motion for a directed verdict was granted.

NOTE: Although this case was decided in 1969, the published opinion first appeared in 1971.

TEACHER/SCHOOL BOARD NEGOTIATION

California

Trustees of the California State Colleges v. Local 1352, San Francisco State College Federation of Teachers
92 Cal.Rptr. 134
Court of Appeal of California, First District, Division 4, December 18, 1970.

On January 6, 1969, a strike was commenced by the teachers union against San Francisco State College. Picket lines were set up, and ingress and egress at the campus were physically interfered with. It was necessary for the police to be called. On January 8, 1969, the trustees of the state college system sought to enjoin the strike and the related activities. A preliminary injunction was granted, and on October 27, 1969, summary judgment was granted in favor of the trustees. The union then appealed.

The injunction issued under the summary judgment banned a strike, picketing in support of a strike, interfering with the work of the college for the purposes of supporting a strike, and coercing, compelling, inducing, or encouraging any employees of the college to engage in a strike against the college.

The principal issue on appeal was the right of public employees to strike. The appellate court held that under common law as followed in California, public employees do not have the right to strike absent a statutory grant; that no such grant exists; that the strike was, therefore, unlawful and that the judgment of the trial court was valid. The appellate court disagreed with the argument of the union that the injunction amounted to involuntary servitude in that it prohibited a withdrawal of labor which cannot be curtailed under the Thirteenth Amendment. While each employee could withdraw his labor by quitting his employment, the court said, this was not tantamount to a right to strike.

The final argument of the union was that the injunction was unconstitutionally overbroad because it enjoined all picketing. The court said that the picketing here was properly enjoined because it supported a strike by public employees which is impermissible and because it resulted in violence and disruption on the campus. The appellate court noted that informational picketing was not enjoined, only picketing in support of the strike. The judgment of the trial court was affirmed.

Indiana

Hanover Township Federation of Teachers v. Hanover Community School Corporation
318 F.Supp. 757
United States District Court, N.D. Indiana, Hammond Division, August 3, 1970; supplemental memorandum August 14, 1970.

The Hanover school district sent out individual contracts to teachers for the 1970-71 school year with the notation that if they were not returned by June 1, 1970, the board would deem it a rejection of further employment rights. Twenty-two teachers who did not return their contracts by that date were notified that they would not be re-employed.

The teachers instituted a civil rights action. They claimed that the sending out of the individual contracts constituted a failure on the part of the board to negotiate in good faith with the Hanover Township Federation of Teachers, their collective bargaining agent. The court ruled that the teachers had not shown the deprivation of a federal constitutional or statutory right. The contentions of the teachers that the school-board action violated state law or constituted a breach of duty to bargain in good faith, the court said, raised issues cognizable in state courts but failed to present any federal question. The action was dismissed as to these teachers.

In a supplemental memorandum the court considered the claims of nine members of the teachers union whose contracts were not renewed for the 1970-71 school year. Eight of the teachers were nontenured, one had tenure. The teachers claimed that nonrenewal was in deprivation of their associational rights under the Constitution of the United States. The court found ample evidence to prove this point. All nine were active in the union, and the five members of the negotiating team were among the nine whose contracts were not renewed.

The court was convinced that the reasons given by the school officials for discharging the teachers were "merely illusory and intended to cover up the real motives for the termination of the teachers." The activities of both the high-school principal and the superintendent indicated that their intention to have the union teachers discharged was formed prior to the incidents upon which the school board supposedly relied in discharging them.

The court concluded that the contracts of the nine teachers were terminated in retribution for their union activities and that such termination violated the constitutional guarantee of freedom of association. The school officials were directed to offer the teachers contracts for the next school year at terms no less favorable than in their 1969-70 contracts, including responsibilities for extracurricular activities. The school officials were enjoined from discriminating in any way against members of the union for exercising their First Amendment right of association.

Kentucky

Jefferson County Teachers Association v. Board of Education of Jefferson County
463 S.W.2d 627
Court of Appeals of Kentucky, October 30, 1970; rehearing denied, March 19, 1971. Certiorari denied, 92 S.Ct. 75, October 12, 1971.

The teachers association and individual teachers appealed from the trial court issuance of a preliminary injunction against a strike which had been in progress for four days. The teachers returned to work following the injunction.

On appeal the teachers contended that they had the right to strike under state law. This contention was based on a provision of the state law which granted the right to strike to "employees" without making a differentiation between public and private employees. The court noted at the outset that under common law and the statutes of many states, public employees are forbidden to engage in a strike. Prior to the revision of the Kentucky statutes, Kentucky public employees were expressly exempted from the law relating to employer-employee relations and recognizing the right to strike. It was the opinion of the appellate court that the "apparently inadvertent omission of this exclusion in [the employer-employee relations law] when the statutes were revised cannot be held to have changed the legislative policy and the law." Therefore, the court ruled that the association and the teachers could not claim that the legislature had granted them the right to strike.

The next contention of the association and the teachers was that the denial of the right to strike constituted a denial of due process in violation of the state and federal constitutions. The court said that this argument was based on the unfounded assumption that public employees had a constitutional right to strike. Reviewing decisions of other states relating to the right to strike, the court noted that it had been held that the denial to public employees of the right to strike does not violate either due process or equal protection of the laws. The association and the teachers further contended that the denial of their right to strike imposed involuntary servitude in violation of the Constitution. The appellate court also disagreed with this argument, saying that the teachers were not compelled to perform personal service since they could always terminate their contracts if they wished.

Nor would the court accept the arguments that the injunction violated constitutional rights to free speech and public assembly or that since two of the organizations included in this appeal were operating under negotiated agreement with the school board, they also had the same bargaining rights as unions in private industry, including right to strike. Finally the court rejected the argument that the school district failed to show irreparable injury prior to the issuance of the injunction. Accordingly, the decision of the lower court in favor of the school district was affirmed.

NOTE: The Supreme Court of the United States declined to hear an appeal from this decision.

Massachusetts

School Committee of New Bedford v. Dlouhy
271 N.E.2d 655
Supreme Judicial Court of Massachusetts, Bristol, June 30, 1971.

The school committee and the city of New Bedford brought suit in 1968 and 1969 against certain named teacher-members of the local teachers association and against the director of field services for the Massachusetts Teachers Association seeking to enjoin a strike and to enjoin the director from encouraging or inducing a strike. Relief was granted by a restraining order followed by a preliminary injunction, a final decree, and judgments of civil contempt against all of the defendants and a judgment of criminal contempt against the director. This proceeding involved appeals from all actions.

The appellate court found that both the final decree in 1968 and the one in 1969 enjoining the strike were entered by the court with the consent

of the defendants. In view of this, an appeal on these decrees could not be sustained.

The next appeal was from the adjudication of civil contempt. The appellate court found that each of the defendants was asked in open court if he admitted or denied his guilt. All having admitted guilt, the appellate court held that they waived their rights to later raise legal and constitutional questions presented to the trial court prior to an admission of guilt.

The defendants also appealed the amount of the fine levied against them. Damages caused to the city by the strike was assessed at $100,000 and the trial court decided that this loss could be shared by both sides and fined the defendants a total of $50,000. Defendants questioned the fine on the basis of a letter written to the teachers by the superintendent almost a year after the fine was imposed. The appellate court said that it was precluded from considering matters which did not appear before the trial court and found no error in the amount of the fine imposed by that court.

The final appeal was that of the director of field services, from the finding that he was guilty of criminal contempt and the imposition of a $5,000 fine against him. The appellate court found that the director had admitted guilt to the charge of civil contempt but had never been asked if he was guilty nor admitted guilt to the charge of criminal contempt. He was not tried on that charge, nor was evidence presented against him on the charge. The punishment for criminal contempt, the court said, is solely for the vindication of public authority and in general the proceedings leading up to punishment should be in accordance with principles which govern the practice in criminal cases. Since this was not the case here, the judgment of criminal contempt and the $5,000 were reversed. The remainder of the judgment against the teachers and the director was affirmed.

Minnesota

Head v. Special School District No. 1
182 N.W.2d 887
Supreme Court of Minnesota, December 9, 1970; rehearing denied February 9, 1971. Certiorari denied, 92 S.Ct. 196, October 19, 1971.

The Attorney General of Minnesota brought suit against the school district, seeking to enjoin it from making payment to striking Minneapolis school teachers pursuant to an agreement between the school district and the Minneapolis Federation of Teachers (MFT) and the City of Minneapolis Education Association (CMEA). The trial court granted the injunction, and the school district and two organizations appealed.

In February 1970, the school board was engaged in negotiations with the teachers' council made up of three representatives of MFT and two representatives of CMEA. When the parties were unable to reach agreement on a salary schedule for the 1970-71 school year, the board, in accordance with state law, requested the establishment of an adjustment panel and named its representatives to the panel. The council chose not to name its representatives and subsequently two panel members were named by the court. Following the report and recommendations of the panel, which the board accepted, MFT voted to strike on April 9, 1970. CMEA sought personal leave for its members for two days, and when this was denied, voted not to join in the strike. However, some CMEA members did strike. The strike took place, and picketing continued even after an injunction was obtained by the board. Subsequently the board closed the schools.

Negotiations continued, and in order to get the two teacher organizations to recommend to their members to return to the schools the board agreed to three resolutions. The first two of these were the basis of this action. Resolution A rehired the striking teachers and proposed to pay to each as part of his or her last paycheck for the 1970-71 school year an amount equivalent to the difference in pay between what was received for the 1970-71 school year and what the teacher would have been paid during that year if the teacher had been on the appropriate step of the salary schedule. Resolution B proposed to pay each of the teachers for seven days during the strike period an amount equal to their regular salary.

The state attorney general alleged that the agreement and Resolutions A and B violated the state no-strike law that provides that public employees who do strike automatically abandon and terminate their employment. Such employees can subsequently be reappointed only on certain conditions, including that their pay cannot exceed that which they received prior to the strike, that their compensation cannot be increased within one year of the reappointment, and that they shall be on probation for a period of two years following the reappointment. The trial court had determined that the resolutions of the board violated the no-strike statute and that the statute was constitutional.

The state supreme court reviewed cases in other jurisdictions that upheld similar legislation barring strikes by public employees and concluded that the Minnesota legislation was constitutional. The

statute, the court stated, neither violated the First Amendment nor denied the teachers due process or equal protection under the Fourteenth Amendment. The court said that since striking employees are terminated as soon as a violation of the statute takes place, no compensation can be paid to them during the period of nonemployment. Thus, Resolution B, which purported to pay teachers while they were on strike when in effect they were no longer employees of the school district, was null and void. Additionally, the resolution was untenable because it provided pay for work not performed. Further, the court pointed out that the statute provided that increased compensation cannot be paid within one year of the reappointment of striking teachers. Consequently, Resolution A, which sought to make a lump-sum payment at the end of the 1970-71 school year, was in effect paying compensation for work performed during the 1970-71 school year, within one year of the reappointment of the teachers, which was contrary to the statute. The order of the lower court against the school district and the two teachers organizations was therefore affirmed.

The Supreme Court of the United States denied a writ of certiorari for a review of this decision.

Missouri

St. Louis Teachers Association v. Board of Education of the City of St. Louis
467 S.W.2d 283
St. Louis Court of Appeals, Missouri,
April 27, 1971.

(See *Teacher's Day in Court: Review of 1970*, p. 57.)

The teacher association and several teachers sought a declaratory judgment against the board of education of St. Louis, alleging that the board had refused to recognize the association and requesting that the court rule that the board could enter into negotiations with the association. The trial court dismissed the petition, and the teachers appealed. The state supreme court ruled that it did not have jurisdiction of the controversy and transferred the case to a lower appellate court.

On this appeal the teachers first alleged that the trial court erred in dismissing the petition because it did present a justiciable controversy. The board argued that it did not. In agreeing with the board, the court noted that nowhere was it alleged that teachers who were members of the association appointed the association as their bargaining representative. It also was not alleged that the association presented or attempted to present a specific or definite problem, grievance, or request to the board and was not heard, nor was there any allegation as to the nature of the problems that they attempted to negotiate. The court said that a definite statement of facts describing a controversy ripe for determination was lacking; the petition merely alleged some difference of opinion as to some general matter and asked the court for an advisory opinion on related legal problems which might or might not come to pass.

Ruling that there was no justiciable controversy, the appellate court affirmed the trial court's dismissal of the association petition.

New Jersey

The Board of Education of Newark v. Newark Teachers Union, Local No. 481
276 A.2d 175
Superior Court of New Jersey, Appellate Division,
April 5, 1971. Certiorari denied, 92 S.Ct. 275,
November 9, 1971.

The teachers union and 185 individual teachers appealed from summary judgments of contempt of court and the sentences and fines imposed pursuant to these judgments. All of the defendants had been found guilty of violating a restraining order prohibiting the union and the teachers from engaging in a strike against the Newark board of education or from doing anything in furtherance of the strike. Despite the restraining order the strike continued for most of the month of February 1971. Most of the individual defendants were arrested when found picketing or congregating outside schools on what would have been a normal school day. Six union officials were arrested pursuant to warrants specifically naming them, and most all of the others were arrested pursuant to a general order directing the sheriff to arrest "any individual who in his presence or that of any member of his staff is observed to continue to violate this court's order of January 31, 1971."

The first contention on appeal was that the general order of arrest was illegal and that the state could not rely upon this illegal order to arrest the unnamed pickets. The court held that even if the general order was invalid for failing to identify the persons to be arrested, it did not follow that the arrests were also invalid. The offense was a misdemeanor for which arrests can be made if the offense was committed in the presence of the arresting officer. The court concluded that they were so committed, and were valid arrests. The restraining

order, the court said, contained broad enough language to warrant the arrest of individuals aiding and abetting. The individuals assembling or milling about outside the schools, inferably to deter teachers and other school personnel from attending to their duties or to encourage others to participate in the strike were aiding and abetting others to violate the restraining order as well as doing so themselves.

The second contention was that the teachers were all convicted for contempt of court for absence from the classroom although they were not charged with that act. The court found from the totality of the evidence that the teachers' absence from the classroom was in furtherance of the illegal strike and that the vast majority of the individual teachers were proven to have been picketing in violation of the restraining order. It was also asserted that eight of the teachers were not proven to have been picketing and were convicted solely on their absence from class. In reviewing the cases of these eight teachers, the court found that they were also found properly guilty of contempt "in that the proofs justified beyond a reasonable doubt findings that they violated the restraining order by willfully participating in or aiding and abetting the strike in one or more of the ways prohibited by the restraining order."

The court also did not agree with the assertion that the teachers were afforded no notice or inadequate notice of the offenses with which they were charged. The court found that state rules governing summary contempt proceedings were complied with in that each teacher arrested was properly notified of the charges.

The final contention of the defendants was that the sentences imposed were "arbitrary and excessive." For the most part the teachers received 10 days in jail and a $200 fine. Union leaders received up to three months in jail and a $500 fine. The union itself was fined $40,000. The defendants asserted that they were being punished essentially for striking and not for violating the restraining order. Based on the whole record, the appellate court concurred in the sentences imposed. The appeals of the teachers and the union were dismissed.

The Supreme Court of the United States denied a writ of certiorari for a review of this case.

In re Jersey City Education Association
278 A.2d 206
Superior Court of New Jersey, Appellate Division, May 21, 1971. Certiorari denied, 92 S.Ct. 268, November 9, 1971.

The Jersey City Education Association (Association) and 20 individual teachers appealed from their convictions of contempt of court for violation of an anti-strike injunction on the ground that the injunctive order was unconstitutionally issued.

The background of events showed that following an impasse in negotiations, largely attributable to the board's statement that a $100 increase per teacher was its final offer, and also because of failure to agree on issues concerning class size, a fact-finding group was appointed. After various meetings of the parties in which the Association unsuccessfully sought to have the board of school estimate defer adoption of the proposed budget until the disputed issues were resolved, and while the fact-finding group was still meeting, the teachers voted on February 8, 1971, to strike. The following day the board sought and was granted a temporary restraining order against the Association on the basis of the Association's concession that as of that day a strike existed. On February 10, each of the officers of the Association and the members of the executive board were served with a copy of the order. When the strike continued, an order was issued for their arrest. On February 19, ten more teachers were ordered arrested for violation of the court order.

With the exception of one teacher, one Association officer, and the New Jersey Education Association, all of the defendants were found guilty of contempt of court. Fines and jails sentences were assessed against the individuals, and the Association was fined $10,000.

The first issue on appeal was the validity of the restraining order. The defendants argued that it was issued contrary to the state constitution. On this point, the court ruled that the state of the law was contrary to this assertion.

The next argument was that there was not proof beyond a reasonable doubt that there were knowing violations of the order. The officers and members of the executive board of the Association contended that there was no proof that they were absent from school pursuant to a strike plan. They also argued that their attendance records were improperly admitted. The court was satisfied that the records were properly admitted into evidence and that they warranted the inference that the individual teacher-defendants were absent from school pursuant to strike activity. The court said: "Such evidence of absence from school without excuse or explanation in violation of school regulation, coupled with all the other evidence, including the fact that a union strike was in progress and that these defendants occupied executive positions in the Association whose members voted the strike, established beyond question that all of these individual defendants, as well as the Association of which

they were officers, were participating directly or indirectly in the strike, and aiding and abetting it in violation of the restraining order."

As to the second group of teachers, those arrested on February 19, the primary issue was the adequacy of the notice. In view of the fact that the strike was well publicized and that the restraining order was published in its entirety in full-page displays in both local daily papers, in the opinion of the court the inescapable inference from all the circumstances was that the teachers were not only aware of the strike but that they were also aware of the contents of the order, whose proscriptive terms extended to all members of the Association. According to the court, the record was sufficient to justify the conclusion that these teachers acted with knowledge of the restraining order.

Finally, the Association argued that the $10,000 fine levied against it exceeded that authorized by law. The court noted that the provision relied upon by the Association referred to disorderly persons and did not mention punishment for criminal contempt of court. The court concluded that the Disorderly Persons Act did not apply to contempt of court. It also held that the amount of the fine did not transform the offense from a petty one to a serious one, the latter of which would require a jury trial. The court ruled that the fine imposed on the Association was proper. The decision of the trial court in all respects was affirmed.

The Supreme Court of the United States denied a writ of certiorari for a review of this decision.

New York

Board of Education of Central School District No. 1, Town of Clarkstown v. Cracovia
321 N.Y.S.2d 496
Supreme Court of New York, Appellate Division, Second Department, April 19, 1971.

The school board sought to stay arbitration which the teachers association had demanded. The association filed a cross motion to compel arbitration. The trial court ruled in favor of the association and the board of education appealed.

A clause in the negotiated agreement between the parties contained a provision for maximum class size. There was also a provision for arbitration of grievances whereunder the decision of the arbitrator was to be binding with respect to those grievances covering interpretation or application of the contract and advisory with respect to those grievances concerning provisions of the contract that involved the board's discretion or right to set policy. The board argued that since the grievance on maximum class size was in the latter category and the arbitration was to be advisory, the court did not have the power to direct arbitration of a dispute which results in an award which can only be advisory in nature.

The appellate court disagreed with this argument, stating that it was no longer necessary under state law that a contractual dispute be of a justiciable nature before binding or advisory arbitration will be ordered. The court did not decide whether the grievance was subject to advisory or binding arbitration. Rather, the decision of the trial court directing arbitration was affirmed.

Board of Education, Central School District No. 1 of the Town of Grand Island, Erie County v. Grand Island Teachers' Association
324 N.Y.S.2d 717
Supreme Court of New York, Erie County, September 25, 1970.

The school board sought to stay arbitration of an alleged dispute between it and the teachers association. The contract between the parties provided for arbitration of grievances and defined a grievance as a claim by any member(s) of the instructional unit based upon an event or condition affecting their welfare and/or terms and conditions of employment and arising from a claimed violation, misinterpretation, misapplication, or inequitable application of the contract.

This action arose out of the termination of six probationary teachers. The association filed a grievance charging the chief school officer and the board with violations of the teacher evaluation and probationary teacher provisions of the contract. The board rejected the grievance at Stage 1 for alleged deficiency in form and/or specification. The association then submitted the grievance in appeal at Stage 2. It was rejected by the board at that level and at Stage 3 on the grounds that the matter was not grievable. The association then served notice that it wished to proceed to arbitration; this was rejected on the ground that the matter was not arbitrable under the contract. Notice of intention to arbitrate was then served on the board. The relief sought by the teachers was that the board direct its administrative staff to comply with the two provisions. In response, the school board commenced this court proceeding.

The court held that there was a bona fide agreement between the parties, that neither fraud nor duress was alleged or inferentially present, and that a real dispute did exist between the parties concerning compliance by the board with certain

provisions of the contract. The court disagreed with the contention of the board that performance of the provisions under dispute would violate state law vesting absolute discretion in the board with respect to termination of employment of probationary teachers. It was not the termination of the employment of the six probationary teachers which was at issue, the court said, but rather the alleged violation by the board of various contractual provisions contained in the negotiated contract.

Accordingly, the petition to stay the arbitration was denied, and the board was directed to proceed to arbitration.

Board of Education of Union Free School District No. 3 of the Town of Huntington v. Associated Teachers of Huntington
319 N.Y.S.2d 469
Supreme Court of New York, Appellate Division, Second Department, March 22, 1971.

(See *Teacher's Day in Court: Review of 1970*, p. 57.)

The board of education sought a judgment declaring that certain portions of the contract between it and the Associated Teachers of Huntington was unconstitutional and unlawful. The trial court upheld parts of the contract and struck down others, and both parties appealed.

The appellate court agreed with that portion of the trial court opinion upholding certain portions of the contract—those involving the liability of the school board to reimburse teachers for replacement of eyeglasses and dentures and replacement or repair of clothing damaged or destroyed in the course of the performance of the teachers' duties, and the payment of a retirement award during the teacher's final year of teaching prior to retirement. Reversing the lower court, the appellate court ruled that the provision in the contract whereby the board agreed to pay the tuition for approved graduate studies that a teacher might take was merely an undertaking to pay "a further relatively small salary increment to teachers who are improving their skills." The appellate court held that the board had the power to make these payments, especially since they would further the statutory public purpose of improving the skills of teachers in their professional capacity.

The appellate court also was of the opinion that a board of education is better qualified to decide whether a teacher should be dismissed for incompetency or misconduct than an arbitrator, and since the dismissal of a teacher for incompetency or misconduct is a matter of vital importance to the public and especially school children who are affected thereby, the contractual delegation to an arbitrator of the power to determine whether a teacher should be dismissed is void as against major public policy. For these reasons the decision of the trial court declaring the delegation illegal was affirmed.

NOTE: The New York Court of Appeals, the highest state court, ruled on March 16, 1972, that all the provisions in the negotiated agreement which the school board challenged are valid. Each provision constituted a term and condition of employment as to which the school board was required to negotiate under the Taylor Act. Under that act, the court stated, "the obligation to bargain as to all terms and conditions of employment is a broad and unqualified one, and there is no reason why the mandatory provision of that act should be limited, in any way, except in cases where some other applicable statutory provision explicitly and definitively prohibits the public employer from making an agreement as to the particular term or condition of employment." The Court of Appeals reversed the lower court and held that the grievance procedure in the negotiated agreement providing that any dispute on the existence of cause for disciplinary action or dismissal of a tenure teacher may be submitted to arbitration was valid. The court said that the board is not prohibited from agreeing that a teacher may choose arbitration as a method of reviewing its determination despite the fact that the state tenure law provides procedures whereby a teacher may challenge an adverse action of the school board. 331 N.Y.S.2d 17 (1972).

Board of Education, Union Free School District No. 7 v. Deer Park Teachers' Association
322 N.Y.S.2d 110
Supreme Court of New York, Special Term, Suffolk County, April 8, 1969.

The school board sought a stay of the arbitration of two grievances which was demanded by the teachers association. The first grievance involved the refusal of the district principal to grant supplementary leave to a teacher to permit her to appear as a plaintiff in a California court case. The second concerned the refusal of the district principal to grant religious leave to a teacher whose husband was the rabbi of an orthodox Jewish temple by deducting the leave from her accumulated sick leave in accordance with past practices of the school district.

The first contention of the board in seeking the stay of arbitration was that the subject matter of the grievances was not arbitrable under the terms of the contract since neither leave was listed in the category of supplementary leave in the contract between the parties, and that this omission reserves the regulation of such leave to the board pursuant to the Education Law. The court did not agree with this contention, stating that state law provides for negotiation on terms and conditions of employment and that the supplementary leave section of the contract specifically confers the authority to grant such leave on the district principal. The next claim of the school board was that the notice of appeal to arbitrate was improperly served. The court found this argument likewise without merit.

In addressing itself to the question of arbitrability, the court noted that the entire purpose of the contract, as conceded by the school board, was to effectuate the state law governing public employees' right to collective bargaining on "terms and conditions of employment" and the "administration of grievances." The contract at issue defines grievance as "any dispute between the parties hereto with respect to the meaning or interpretation of any provision of this agreement." The sentence on supplementary leave in the agreement provides that "the District Principal has additional discretionary authority to grant leaves on request for any situation not specifically covered under our *present policy*. Such authority may cover both deductible and non-deductible leaves, with or without pay." The board of education argued that *present policy* referred to the instant contract, while the teachers association contended that the phrase referred to a viable pre-existing policy incorporated into the contract by reference. The court held that since under the terms of the contract a grievance means any dispute concerning the interpretation of a provision of the contract, the questions of whether the grant of discretionary authority to the District Principal was absolute, and the meaning of present policy were subject to arbitration. The petition of the school board to stay arbitration was denied.

Buffalo Teachers' Federation Inc. v. Helsby
316 N.Y.S.2d 125
Supreme Court of New York, Appellate Division, Third Department, December 7, 1970.

The Buffalo Teachers' Federation appealed from a lower court judgment dismissing their petition seeking to restrain the Public Employment Relations Board (PERB) from prosecuting a charge against the Federation for violation of the no-strike law. The Federation maintained that PERB was exceeding its jurisdiction on the ground that since the teachers had been found by the chief executive officer of the school district not to have engaged in a strike, the employee organization could not be in violation of the law.

The court found that under the law, PERB has no responsibility with respect to violations by individual employees but it is authorized to institute proceedings to determine if an employee organization has violated the statute. The penalty for such violation is the loss of the right to have membership dues deducted from employee paychecks. The court ruled that the proceeding against the organization was separate and distinct from any determination as to an individual employee's violation of the statute and, as such, PERB was entitled to institute the proceedings. Further, determination of the chief executive officer was an administrative decision without a hearing and was not binding upon PERB in proceeding against the employee or organization.

The court also ruled that the notice mailed to the president of the Federation was in compliance with law. The court ruled further that the no-strike law as applied to public employees was constitutional.

The judgment of the trial court dismissing the complaint of the Federation was affirmed.

Caso v. Katz
324 N.Y.S.2d 712
Supreme Court of New York, Special Term, Nassau County, Part I, September 30, 1971.

Nassau Community College and various county officials sought an injunction against the faculty of the college, the Faculty Association, and its officers, to enjoin what they described as a strike. The response of the teachers was that they were performing their duties in the "normal manner" and therefore not on strike.

It appeared that under a negotiated agreement that expired August 31, 1971, the teachers, with a few exceptions, were required to teach 12 hours per week. In the last legislative session a bill had passed both houses that would have required the county to adopt a 15-hour contact-teaching schedule. The county made plans for the 15-hour program under this bill which was subsequently vetoed by the governor. The teachers at the college had refused to teach more than the 12 hours required under the expired contract, and negotiations broke down on reaching a new contract.

The court noted that strikes by public employees are forbidden by statute, which recites that

"absence from work or abstention wholly or in part from the full performance of duties in normal manner creates a presumption that the strike exists." The phrase "normal manner" as the court construed the statute, did not mean length of hours of employment but rather the fashion in which the duty is discharged.

The court found that the teachers were public employees, that their contract had expired, and that they were engaged in a strike. Therefore, the court felt constrained to issue the injunction without a consideration of the merits of the controversy. The court did state that at the request of the parties, it would be available to participate in further discussions.

Cirillo v. Board of Education of the City School District of the City of Niagara Falls
321 N.Y.S.2d 952
Supreme Court of New York, Niagara County,
June 15, 1971.

Six Niagara Falls teachers contending that they were representative of a class of 687 teachers, sought to require the superintendent to return money deducted from their paychecks and to cancel tenure forfeitures as a result of a strike in September 8-11, 1970.

The deductions were made pursuant to the state Taylor law providing for a deduction of two days' pay for every day missed because of a strike. Under this law teachers are permitted to file affidavits in opposition to a determination that they violated the law. It was conceded that none of the 687 teachers had filed objection to the determination or requested a hearing on the determination within 20 days as provided under the law.

The teachers contended that the 50-day delay between the last day of the strike, September 11, 1970, and the serving of the notice that a violation had been found, November 2, 1970, was so unreasonable as to render such notice of violation nugatory. The court disagreed, noting that the size of the school district and the number of teachers on strike had to be considered in a ruling on the reasonableness of the time interval. The Taylor law imposes a duty on the chief executive officer of the school district to make a determination after investigation as he may deem appropriate. The court found the time interval to be reasonable under all of the circumstances of the case. Also rejecting the teachers' argument that no investigation was necessary since the payroll records for the period could have been used, the court noted that payroll records had deductions for absences in addition to those made on account of the strike.

Concluding that the determination was timely made and that the deductions were appropriate, the court granted the motion of the superintendent and school board to dismiss the action.

Ewen v. Board of Education of Union Free School District No. 18
323 N.Y.S.2d 789
Supreme Court of New York, Special Term,
Nassau County, Part I, July 15, 1971;
on reargument August 4, 1971.

The president of the Plainridge Federation of Teachers sued the board of education seeking to compel it to grant sabbatical leaves of absence. The case arose as a result of the enactment of a 1971 state law barring sabbatical leaves for public employees for the 1971-72 year unless a contractual right to such leave existed as of April 12, 1971.

The teachers union and the school board had a negotiated agreement providing that "a sabbatical leave of absence may be granted for study or travel." The contract also provided that the board of education reserved the right to reject any and all applications for leave. On March 30, 1971, one of the teachers in the school system applied for leave. Admittedly, the request was denied because of the new state law.

The question before the court was whether a vested contractual right to the leave existed prior to April 12, 1971. Looking at the language of the contract the court decided that it did not, for nowhere was the board of education bound to approve any application for leave. In the absence of a contractual right to such leave, the court ruled that the statute operated to bar such leave. Accordingly the petition of the teachers was dismissed.

The court later granted reargument because of the contention of the teacher who was denied leave that he had applied for a summer sabbatical leave and that this was not prohibited by the statute. Under the statute sabbatical leave did not include vacation time. However, the court noted that a teacher is an employee of the school system all year, not only for 10 months. Accordingly, to pay a teacher on summer sabbatical would also be a violation of the statute. The previous decision of the court was affirmed.

Hauppauge Classroom Teachers Association v. Millman
317 N.Y.S.2d 461
Supreme Court of New York, Appellate Division,
Second Department, November 30, 1970.

(See page 75.)

In re Lakeland Federation of Teachers, Local 1760
317 N.Y.S.2d 902
Supreme Court of New York, Westchester County, January 28, 1971.

The board of education of Central School District No. 1 brought an action seeking to punish certain individual teachers and the teachers union for contempt of court for violating an injunction. The injunction restrained the individual defendants and the union from engaging in a strike against the school district. The injunction was in effect from September 9, 1970, but the strike continued until September 16, 1970.

In this proceeding the teachers and the union sought to vacate the order to show cause why they should not be punished for contempt of court for violation of the injunction. Their procedural arguments were rejected by the court. With regard to the merits of the controversy, the court held that the testimony that certain of the teachers were absent from school during the work stoppage and certain of them were seen on the picket line, was insufficent proof that the individual teachers had willfully engaged in a strike in violation of the order of the court. However, the court held that the union had willfully engaged in a strike in violation of the court order, for there was evidence to show that the strike was deliberately planned and executed by the union. The court found the union guilty of criminal contempt for its willful disobedience of the court's lawful mandate and fined it $5,000.

Lawson v. Board of Education of Vestal Central School District No. 1
315 N.Y.S.2d 877
Supreme Court of New York, Appellate Division, Third Department, November 23, 1970. Appeal dismissed, 92 S.Ct. 230, October 26, 1971.

(See *Teacher's Day in Court: Review of 1970*, p. 60.)

Teachers in the Vestal school district appealed from a trial court judgment dismissing their complaint. New York law provides that teachers who have engaged in a strike shall have two days' pay deducted for every day on strike. The teachers had challenged the constitutionality of the law, and the lower court upheld the statute.

The appellate court found that the teachers had been adequately notified by letter that the chief executive officer of the district had found them in violation of the anti-strike statute. The appellate court held that the system of review by objection to the board's determination that the teachers had engaged in an illegal strike was not necessarily inadequate to satisfy the requirements of due process since the teachers could have sought administrative review of the board's determination but did not attempt to utilize this procedure. This failure foreclosed consideration by the court as to whether there was any strike or whether the individual teachers who received the notice had struck.

The court also found no merit to the contention of the teachers that the statute prohibiting strikes by public employees and imposing sanctions was unconstitutional. The dismissal of the teachers' complaint was therefore upheld.

NOTE: The Supreme Court of the United States dismissed an appeal from this decision for want of a substantial federal question.

Lehman v. Dobbs Ferry Board of Education Union Free School District No. 3, Town of Greenburgh
323 N.Y.S.2d 283
Supreme Court of New York, Westchester County, June 7, 1971.

The Dobbs Ferry Teachers Association sought a court order compelling the arbitration of a dispute. The school board denied that the matter was arbitrable.

The contract in effect between the parties provided for arbitration of "agreement grievances" arising out of an alleged violation, misinterpretation, or inequitable application of the terms of the contract. The contract also recognized that the board had the right and responsibility to direct the operation of the schools in all aspects authorized by statute and that this right would not be exercised "in a manner inconsistent with or in violation of this agreement and/or applicable statutes."

The dispute giving rise to this suit occurred when the board dismissed a probationary school nurse. The position of school nurse is classified as a civil service position. It was the position of the association that the nurse was not dismissed in accordance with the applicable civil service rules and, therefore, the contract provision referring to applicable statutes was violated, creating an "agreement grievance" subject to arbitration. The school board argued that whether or not this was an arbitrable grievance was a decision to be made by the court and further that this was not an "agreement grievance" requiring arbitration.

The court said that the heart of the issue here was the right of the school board to run the district. It pointed out that the probationary status of the nurse was governed by the county civil service rules, which the court noted were not statutes.

The court found that the collective bargaining agreement specifically established in the personal grievance procedure provisions for treating a dispute involving a single employee appointed by and under the sole authority of the board. The court also found that the parties to the agreement had agreed to preserve the board's power to run the district in the very same paragraph that the association and the nurse were relying on to turn the decision-making process over to the arbitrator. The court said that what was involved here was a personal right of the employee involved and not "a violation, misinterpretation or inequitable application of the agreement." This decision, the court said, was not leaving the nurse without a remedy, just that her remedy was not to be determined by arbitration. If a violation existed, it could be determined in administrative and judicial proceedings. The application of the association for an order directing arbitration was denied.

Mahopac Teachers Association v. Board of Education, Central School District No. 1
323 N.Y.S.2d 997
Supreme Court of New York, Putnam County,
July 9, 1971.

In this action the teachers association contended that a contractual right existed for sabbatical leave prior to the effective date of a 1971 state law declaring a moratorium on such leaves. The crucial date was April 13, 1971.

The court found that the enforceable contractual right referred to in the law was one existing between the individual teacher and the board, not between the association and the board. In this instance the final step provided for in the procedure for granting sabbatical leaves was not accomplished until April 20, 1971. This, the court ruled, brought such action within the proscription of the law and the leaves would not be permitted. Judgment was rendered for the board of education.

Maslinoff v. Central School District No. 1
323 N.Y.S.2d 1005
Supreme Court of New York, Dutchess County,
July 22, 1971.

The president of the Wappinger Central School Faculty Association and three other teachers brought a class action challenging deductions of pay made because of a strike. Over 400 teachers had been penalized in this manner. The superintendent had made separate findings of a violation with respect to each of the teachers, and only one person had filed a protest as authorized by law.

The court ruled that this was not an appropriate class action. For although the teachers had a common complaint, there was an individual review and determination of the penalty that had been made on the basis of individual acts. In any event, the court held, other than the one person who filed a protest, judicial review was not available to the other teachers because they had not filed a protest within 20 days of being notified that they were found to be in violation of the law by striking. The proceeding was dismissed.

North Salem Teachers Association v. Board of Education, Central School District No. 1
323 N.Y.S.2d 996
Supreme Court of New York, Westchester County,
July 2, 1971.

The teachers association and three individual teachers sued the board of education, seeking to compel it to grant sabbatical leaves to the three teachers. At issue was a 1971 state law declaring a one-year moratorium on sabbatical leaves unless there existed a contractual right to such leave as of April 13, 1971.

The association maintained that this right was in existence, arguing that a clause in the contract providing for the continuation of present school-board rules and regulations covered the area of leaves. The board argued that since the association and the board had never agreed on sabbatical leaves in the present contract, there was no contractual right.

The court found it undisputed that the procedures in the rules and regulations regarding sabbatical leaves were fully complied with by the three individual teachers prior to the effective date of the state law. The court held that this constituted a contractual right. The board of education was directed to grant the sabbatical leaves to the three teachers.

Schwartz v. North Salem Board of Education
318 N.Y.S.2d 774
Supreme Court of New York, Westchester County,
January 18, 1971.

A science teacher brought court proceedings seeking to confirm what he alleged was an award granted him by an arbitration hearing. He urged that by virtue of the award he was entitled to either sabbatical leave or the sum of $8,000, representing one-half his annual salary.

The teacher had requested sabbatical leave from the school board; this request was denied. Ultimately the parties agreed to submit the matter to arbitration. The contract between the board and

the teachers association called for the submission of all disputes to *advisory* arbitration.

In view of the precise language in the contract that arbitration was advisory only, the court ruled that no enforcible right was given the teacher from the findings of the arbitrator. The motion of the teacher for confirmation of award was dismissed.

Wilson v. Board of Education, Union Free School District No. 23, Town of Oyster Bay
319 N.Y.S.2d 721
Supreme Court of New York, Special Term,
Nassau County, Part I, December 10, 1970.

Teachers sought to prevent the school board from making payroll deductions at the rate of two days' pay for each day of a strike. The teachers had been absent from their classes from May 7, 1970, through May 21, 1970. On May 7, the superintendent of schools made a determination that a strike existed and that the teachers would be subject to the payroll deductions. Pay for one day was deducted from the salary of each striker, but the teachers were successful in preventing the threatened deduction for the second day in a prior proceeding. There the court ruled that the actions of the superintendent were not in strict compliance with the statutory requirements and therefore his determination could not stand.

On May 26, 1970, the superintendent made the findings required by statute. Under the statute, however, payroll deductions cannot be made sooner than 30 days (June 25, 1970) nor later than 90 days (August 24) after the determination. In that period there would be no salary payments from which deductions could be made because teachers were being paid on a 10-month basis, excluding July and August.

Apparently with this in mind, the superintendent made a "final determination" on August 10, 1970, which would have extended the period during which deductions could be made into September.

The court ruled that this effort of August 10, 1970, was ineffective. The May 26 determination complied with all of the statutory requirements, and there was no difference between it and the later determination which was made only as an attempt to come within the statutory requirements. The court said that were the superintendent permitted to extend the limitation period prescribed in the statute by merely making additional "determinations" in the absence of new facts presented to warrant further action, the purported advantage of the statute to prevent unreasonable delay would be thwarted. Accordingly, since the action of the superintendent in making payroll deductions later than 90 days following his initial determination would violate the state law, the school district was permanently enjoined from making any deduction as a penalty for the strike which occurred from May 7 to May 21, 1970.

Rhode Island

Providence Teachers Union, Local 958 v. School Committee of the City of Providence
276 A.2d 762
Supreme Court of Rhode Island,
April 23, 1971.

The school committee appealed from the order of the trial court confirming an award made by an arbitration board. The arbitration board had ordered the school committee to pay as severance pay retirement benefits to teachers at time of retirement after 35 years of service, calculated on the basis of unused sick leave. This provision was contained in the contract between the school committee and the union negotiated in May 1968 for the 1968-69 school year.

Shortly after the contract was negotiated, a new state law became effective, allowing voters in a city to choose an elected or an appointed school committee. The Providence school committee at that time was elected. The voters of the city chose an appointed committee that would not be fiscally independent and would receive an appropriation from the city. Shortly after the new committee took office, it passed a resolution repudiating the severance pay provision of the contract because of the unavailability of funds.

The union challenged the action of the committee through the arbitration provisions of the contract which required submission of a grievance to binding arbitration. A grievance was defined as "a violation, inequitable application, . . . or misrepresentation," of the contract. A majority of the arbitration board ordered payment of the retirement benefits.

The school committee first argued that its predecessor had no specific legislative authority to enter into the agreement for binding arbitration. To support this contention, the committee pointed to the inclusion in the firefighter's and policemen's arbitration acts and the corresponding absence in the teachers' arbitration act of specific language providing for arbitration of disputes. The court found the difference in language to be the result of the difference in legislative draftsmen and nothing else. Additionally, the court found it apparent that the legislature intended that organizations of pub-

lic employees would have the same rights as their counterparts in the private sector except those that might be specifically withheld, such as the right to strike. Therefore, the court held that the teachers union had the right to provide in its contract with the school committee for the arbitration of grievances arising out of the contract and that the school committee was bound to submit the issue of severance pay to arbitration. Also rejected by the court was the school committee's argument that the arbitration board award must be by unanimous vote. The court said a majority vote was all that was required in view of the absence of specific language to the contrary in the contract.

The school committee argued further that the severance pay clause is prospective only in its operation and is not applicable to any teacher retiring prior to the year 2003; otherwise any sums paid would be a "gratuity" for work already performed. The court found nothing in the nature of a gratuity in the award. It said that the clause serves a useful function in the educational scheme. The payment of accumulated sick leave after 35 years of service "acts as an inducement to teachers to remain in the school system and deters absenteeism for trifling ailments." In the opinion of the court, the retirement award was a proper provision to be included in the contract.

The final school committee argument was that it lacked the funds to pay the award to the 11 teachers who had retired under the provisions of the contract. The court found lack of funds was not a legal basis for the repudiation of a contractual obligation. The appellate court said that the money due the teachers who had retired was a debt of the city and if the city council would not appropriate the money after this case was remanded, the teachers could file suit against the city treasurer. The judgment of the trial court confirming the award of the arbitrator was affirmed and the matter remanded.

Ricciotti v. Warwick School Committee
319 F.Supp. 1006
United States District Court, D. Rhode Island, November 6, 1970.

(See page 96.)

Wisconsin

Board of Education of Unified School District No. 1 v. Wisconsin Employment Relations Commission
191 N.W.2d 242
Supreme Court of Wisconsin, November 5, 1971.

The school district and the Ashland Federation of Teachers (AFT) sought review of an order of the Wisconsin Employment Relations Commission (WERC) that determined that the board and the union had discriminated against the Ashland Education Association (AEA). The problem concerned the timing of state and regional conventions of the two organizations. Prior to 1966, the Wisconsin Federation of Teachers (WFT) and the Wisconsin Education Association (WEA), the respective state organizations with which the local associations are affiliated, held their state conventions at the same time in November. Since that time WFT holds its convention in October on the same dates as the regional affiliate of WEA and AEA. The WEA state convention is still held in November.

During 1966 and 1967, all teachers in the Ashland district who attended either the WFT or the regional convention in October were permitted to count those days as inservice days, and nothing was deducted from their salaries. Additionally, the Ashland school board permitted two representatives of the AEA to attend the WEA state convention in November without loss of pay. In May 1968, the AFT, as majority union and bargaining representative for all teachers, negotiated an agreement with the school board which included a provision for days off with pay for teachers who wished to attend the WFT state convention. No similar provision covered the regional or WEA conventions. In response to a request for a clarification, the superintendent of schools advised that teachers who attended conventions other than the WFT state convention would not be paid for those days. The AEA and an individual member then complained to the WERC which ordered the school board to cease and desist from giving effect to the provision in the collective bargaining agreement unless it contained a similar provision applicable to other conventions on the same dates or from entering into an agreement that contained such a provision without providing that teachers may also attend other conventions scheduled by other teacher organizations on the same dates. The board was also directed to cease deducting payments from the salaries of teachers who attended conventions other than WFT on the same dates. The board was directed to reimburse those AEA teachers who attended the October regional convention for the loss of pay. The board and the AFT sought judicial review of the WERC order. The lower court agreed that there had been a prohibited discriminatory practice. However, the court modified the WERC order to provide that the board must provide days off with pay to all teachers if it grants days off with pay for any teachers, and that all teachers may attend the

convention of their choice no matter when it is held. All parties then appealed.

The appellate court first considered if the contract clause granting time off with pay only for attendance at the WFT state convention was discriminatory. It concluded that since AFT (the WFT affiliate) as the majority union and exclusive bargaining agent for all teachers was empowered to negotiate for all teachers on wages, hours, and conditions of employment, and convention days fell within the negotiation area, the questioned clause treated the members of the majority union preferentially. This was discriminatory treatment in violation of the laws governing public employees. The appellate court ruled that both the union and the board were guilty of discrimination because they agreed to the contract provision "which had the effect of discouraging membership in the minority union by affecting the terms and conditions of their employment." The clause was declared void.

The appellate court then considered the validity of the WERC cease and desist order and the lower court modification of that order. Under state law, WERC has substantial powers to fashion remedies, including requiring affirmative action. But where the duties and powers of school boards and the duties and powers of WERC conflict, courts, by statutory construction, must resolve the issue. State law defines school days as days on which school is actually in session and days on which *state* teachers conventions are held. The law had formerly provided for both state and county conventions but had been amended. Another section of state law provides that boards of education may give teachers time off to attend a teachers educational convention. The court was of the opinion that this section gave the board discretionary power to grant time off with pay to any teacher to attend any education convention, but the exercise of this discretion must not be unreasonable, illegally motivated, or arbitrary. Under the contract, teachers attending the WFT convention in October were given time off with pay which was within the power of the board to agree to. The prohibited discrimination occurred, the court said, when the contract was interpreted as excluding teachers from attending any other educational convention sponsored by the competing minority organization on those dates in October or any other dates. The court pointed out that under the law the board could have permitted teachers of the minority organization to attend the regional convention on the same dates, or their state convention on different dates, with pay, but did not. To so decide was within the school board's power and discretion which WERC could not overlook. The court held that the specific school statutes prevailed over general municipal employees statutes where both cannot be given effect or harmonized.

Accordingly, the appellate court determined that the WERC order insofar as it required payment of salary to those teachers attending the October regional meeting must be reversed. The appellate court also reversed that portion of the lower court order directing that teachers attending the November WEA convention be paid their salary for the days spent at the convention.

The appellate court affirmed those portions of the WERC order, and the trial court order that found a discriminatory practice had been committed. Those portions of both orders providing for affirmative relief were reversed.

LEAVES OF ABSENCE

Georgia

Jinks v. Mays
332 F.Supp. 254
United States District Court, N.D. Georgia, Atlanta Division, September 28, 1971.

A nontenure teacher was re-elected as a probationary teacher for the 1970-71 school year in the Atlanta school system. During the summer of 1970 her attorney wrote to the principal of her school, stating that the teacher was pregnant and was looking forward to rejoining the faculty after the birth of her child in October. The school superintendent replied that as a probationary teacher she was not eligible for maternity leave and that her employment status would be listed as "resigned." The teacher then brought this suit as a class action seeking injunctive and declaratory relief. She asserted that the maternity leave policy of the school board which grants leave to tenure teachers and denies the same leave to nontenure teachers is arbitrary and violative of the equal protection clause of the Fourteenth Amendment.

The first argument of the school board was that the teacher lacked standing to bring the suit. It claimed that when she accepted the offer of the board for a 1970-71 contract, she knew that she was pregnant and, therefore, unable to perform the contract since probationary teachers are not eligible for maternity leave. As a result, argued the board, her contract was void from its inception and she had no standing to sue. In disagreeing with this argument, the court noted that the evidence revealed no policy of the board specifically prohibiting nontenure teachers from accepting an offer to teach. One regulation of the board provided that although nontenure teachers were not eligible for maternity leave, they should comply with the requirements of the policy on maternity leave. The regulations required that the application be made one month prior to such leave and that leave commence at least four months prior to the expected birth of the baby. The regulation, the court said, apparently means that nontenure teachers should go through the procedure of applying for maternity leave. However, since the board did not grant maternity leave to nontenure teachers, it was not clear when they were supposed to file their applications for leave. At the most, the teacher was late in filing for leave that she could not get, and under the board rules she may have forfeited her nonexistent right to return to her job earlier than 12 months after the birth of her child. The court held that the teacher did have standing to bring the suit because she had a personal stake in the outcome of the controversy.

Considering the case on the merits, the court agreed that the authority of the school board to issue regulations for various types of leave for both tenure and nontenure teachers stems from the teacher tenure act applicable to Atlanta. All of the various types of leaves granted, except maternity leave, were available to both tenure and nontenure teachers. Therefore, to withstand constitutional challenges, the classification that treats tenure and nontenure teachers differently for maternity leave must be rational and it must bear a "relevance to the purpose for which the legislation was enacted."

The school board rationalized the difference by arguing that one of the purposes of the teacher tenure act was to provide for meaningful evaluation of nontenure teachers and that if they were allowed maternity leave, which it said averaged seven months, there would be insufficient time for such evaluation. The court would not accept this as the rational basis for the maternity leave policy since the board may extend the probationary period. In fact, the court noted that the board chose to re-elect the teacher in this case for a fourth year on probationary status, presumably because she was qualified enough to warrant further evaluation. Moreover, the court found that nontenure teachers were permitted to go on professional study leave for a one-year period. Also, military leave could be granted to nontenure teachers for a two-year period. In these cases, the court said, the same evaluation problem would arise, yet leave was granted.

The board also claimed that since the purpose of the teacher tenure act was to place nontenure teachers on an annual contract basis, granting them maternity leave would run counter to this design. The court again pointed out that this was not a

rational basis for the policy since nontenure teachers could be granted leave for professional study. Furthermore, no restrictions were placed on the duration of sick leave granted nontenure teachers.

Another board argument against granting maternity leave to nontenure teachers, also rejected by the court, was that the tenure act would require the board to place tenure teachers in the school system when they returned from such leave and although the board was currently able to do so, it might not be able to comply with this statutory duty if the ranks were augmented by nontenure teachers returning from maternity leave. Assuming this interpretation of the tenure act is correct, the court said, the granting of maternity leave to nontenure teachers would in no way require that they be placed ahead of tenure teachers in the school system or that they be placed at all if no positions were available. The reason that this teacher wanted maternity leave was so that she would at least have a preference over teachers who had never been employed by the Atlanta school system. The court also noted that, to date, the board had been able to place nontenure teachers returning from maternity "resignation." This argument, the court ruled, could not be the rational basis required for this classification.

The court concluded that the policy denying maternity leave to nontenure teachers was arbitrary, and had no rational basis or relevance to the teacher tenure act, or administrative purpose. Just as the school board grants study, bereavement, personal illness, emergency, and military leave to both tenure and nontenure teachers, so, too, it must grant maternity leave to tenure and nontenure teachers alike. The court declared that the policy denying maternity leave to nontenure teachers was in violation of the equal protection clause of the Fourteenth Amendment.

The teacher also sought back pay in case the board refused to re-employ her, on the ground that her position had been filled by a new employee. Since there was no evidence that this had been done, the court denied the claim. However, the court did enjoin the school board from refusing to re-employ the teacher if she chose to return and if there was a position available.

Louisiana

Adcock v. Red River Parish School Board
250 So.2d 246
Court of Appeal of Louisiana, Second Circuit, June 22, 1971.

(See page 122.)

Michigan

Rumph v. Wayne Community School District
188 N.W.2d 71
Court of Appeals of Michigan, Division 1, March 24, 1971; rehearing denied May 11, 1971.

(See page 40.)

New York

Board of Education, Union Free School District No. 7 v. Deer Park Teachers' Association
322 N.Y.S.2d 110
Supreme Court of New York, Special Term, Suffolk County, April 8, 1969.

(See page 104.)

Board of Education, Union Free School District No. 18 v. Boken
316 N.Y.S.2d 286
Supreme Court of New York, Special Term, Nassau County, Part I, December 9, 1970.

(See page 21.)

Coffee v. Board of Education of the City of New York
319 N.Y.S.2d 249
Supreme Court of New York, Special Term, Kings County, Part I, March 8, 1971.

A former teacher (guidance counselor) sought an order requiring that certain sick leave and summer salary payments be made to her.

The teacher had been employed by the school district from 1943 until September 11, 1970. On August 28, 1969, she had applied for and was granted a sabbatical leave of absence covering the period until January 31, 1970, for restoration of health. One of the conditions of the leave was that the teacher not engage in gainful employment while on leave. During the leave the school board was informed that the teacher was working, and it commenced an investigation of the matter. In February 1970, the teacher applied for a leave of absence with pay for the spring semester because of illness. In April 1970, she requested a retroactive change in her leave status from sabbatical leave to leave of absence without pay and for a continuation of her medical leave without pay. Apparently unware of this request, the medical leave of absence with pay through June 30, 1970, was approved by the deputy superintendent. However, on May 15, 1970, the teacher again requested that her leave status be changed retroactively to leave without pay and offered to refund any salary paid to

her during the sabbatical leave conditioned on all charges or contemplated charges against her being dropped. This proposal was unacceptable to the board of education; subsequently, on May 18, the medical leave of absence was denied. This suit is for alleged salary rights during the period of medical leave.

The school board alleged as an affirmative defense that the teacher had failed to avail herself of the grievance procedure set out in the contract between the union and the board, and, therefore, failed to exhaust her administrative remedies. The teacher countered by arguing that she had never received a final decision from which she could appeal, and that the collective bargaining agreement was not applicable since she had retired on September 11, 1970, prior to bringing suit.

The court disagreed with the teacher's contentions, noting that the May 18 letter from the deputy superintendent denying her application for a medical leave was a final ruling from which she could appeal. The court ruled that the teacher must exhaust her administrative remedies prior to bringing suit. In this instance the decision of the deputy superintendent could have been appealed to the superintendent. The failure of the teacher to utilize the applicable administrative procedures entitled the school board to judgment dismissing the suit.

Ewen v. Board of Education of Union Free School District No. 18
323 N.Y.S.2d 789
Supreme Court of New York, Special Term, Nassau County, Part I, July 15, 1971; on reargument August 4, 1971.

(See page 106.)

Legislative Conference of the City University of New York v. Board of Higher Education of the City of New York
324 N.Y.S.2d 924
Supreme Court of New York, Special Term, New York County, Part I, June 22, 1971; on motion for reargument, July 27, 1971.

In 1971, the New York state legislature declared a one-year moratorium on sabbatical leave unless a contractual right existed prior to the effective date of the legislation. The Legislative Conference (a group representing employees) sought to require the board of higher education to grant sabbatical leaves to certain employees pursuant to a negotiated agreement between the parties. The Conference claimed that the contractual right existed prior to the effective date of the moratorium.

The court found that the agreement gave the members the right to *apply* for sabbatical leave upon meeting certain requirements but stated that the granting of such leaves was not automatic. In view of this, the court held that no contractual right to the leave was in existence or enforceable prior to the effective date of the enactment, but only the right to apply for the leave. Therefore, the board was correct in refusing to grant the leaves.

On motion for reargument, the Conference alleged that the board itself never considered the applications for leave; instead they were contained as a routine item in the Chancellor's Report that could be adopted in a single motion. However, the court noted that the board resolution that provided for the Chancellor's report also stated that any board member "shall have the right to have any item or items removed from the Chancellor's Report and placed on the Policy Calendar by a simple request to the Chairman of the Board that this be done." Therefore, the court held that since the board reserved the right to itself to make the final decision to delete items from the report, the granting of leaves could not be considered automatic and the contractual right to the leave did not exist as of the effective date of the legislation. The original decision of the court was reaffirmed.

Mahopac Teachers Association v. Board of Education, Central School District No. 1
323 N.Y.S.2d 997
Supreme Court of New York, Putnam County, July 9, 1971.

(See page 108.)

North Salem Teachers Association v. Board of Education, Central School District No. 1
323 N.Y.S.2d 996
Supreme Court of New York, Westchester County, July 2, 1971.

(See page 108.)

Valachovic v. Nyquist
325 N.Y.S.2d 199
Supreme Court of New York, Special Term, Albany County, Part I, August 14, 1971.

A former employee (school psychologist) resigned his employment from Central School District No. 1 in Ulster County in January 1970. The board of education refused to allow him sick leave credits for 29½ days on which he was absent dur-

ing the 1969-70 school year and withheld salary from him accordingly. The employee appealed to the commissioner of education who directed the board to pay him for four of the days but sustained the action of the board with respect to the remaining days. The teacher then brought this appeal from the decision of the commissioner on grounds that is was arbitrary and unreasonable, contrary to law, and in contravention of the terms of the negotiated agreement between the school board and the teachers association.

The employee alleged that during the 1969-70 school year he suffered severe headaches and dizziness that rendered him unable to work, that he was under treatment for this condition and had been absent from school as a result of this illness. He also alleged that he was injured on December 11, 1969, and hospitalized on that date and the next.

From the record before the commissioner it appeared that on December 10, 1969, the director of personnel services had written to the employee, asking for a statement from his doctor. In response he submited a statement from the doctor that the employee "has been under my care and on chemotherapy since November 1, 1969." The medication that the employee was taking was then mentioned. The superintendent of schools then wrote to the employee, calling his attention to the provision in the negotiated contract requiring doctor's statements to substantiate absences due to illness and noting that the statement submitted did not satisfy these requirements and that salary deductions would therefore be made for unexcused absences unless further evidence was submitted. The employee was also notified that a physician's excuse would be required for any future absences reported as due to illness. Further statements to the effect that he was under treatment were then submitted.

In the hearing before the commissioner, the board alleged that except for three days, the proof submitted by the employee was insufficient to show that he was unable to perform his duties and insufficient to satisfy the requirements of the provisions in the negotiated contract between the board and the teachers association. At this hearing the employee submitted medical statements showing dates of treatment. He also claimed that he had sufficient sick leave to cover all of the days taken off and therefore there should be no salary deductions. The commissioner found that the action of the board was not arbitrary because insufficient medical statements to explain the absences had been submitted.

Under New York law, the decisions of the commissioner are final unless they are shown to be purely arbitrary. The contract provision referred to in the decision of the commissioner required physician's certificates for proof of illness exceeding seven days and could be requested for lesser periods. The commissioner had determined the board's interpretation of this provision to be reasonable. The court was unable to conclude that this decision was purely arbitrary. Accordingly, the decision of the commissioner was affirmed and the psychologist's petition dismissed.

Ohio

LaFleur v. Cleveland Board of Education
326 F.Supp. 1208
United States District Court, N.D. Ohio, E.D.,
May 12, 1971.

Two pregnant teachers sought to enjoin the Cleveland school board from enforcing the provisions of its maternity leave regulation. The regulation required that maternity leave begin not less than five months prior to the expected date of the birth of the child, that the teacher give one month's advance notice of intent to take maternity leave, and that the teacher return at the beginning of the regular semester following the child's age of three months. Both teachers were expecting the birth of their children during the summer of 1971. The first teacher did not request maternity leave; rather, the regulation was enforced against her. The second teacher applied for maternity leave prior to being forced to take leave.

The teachers contended that the maternity leave provision was discriminatory against them as female employees and that it deprived them of their constitutional rights, privileges, and immunities. They sought a declaratory judgment declaring the regulation unlawful and injunctive relief to bar its enforcement.

The school board maintained that the regulation was a valid exercise of their statutory authority to make rules and regulations for its government and the government of its employees and pupils, and that it violated no constitutional right of the teachers.

The evidence indicated that the maternity leave regulation had been adopted in the early 1950's upon request of the school superintendent. Prior to this time no such regulation existed. The evidence also showed that prior to the adoption of the regulation, pregnant teachers had been subject to various indignities from students such as pointing, giggling, laughing, and making snide remarks, causing interruption and interference in the classroom. Witnesses for the school board also testified as to the recent increased violence in the public

schools, including attacks on teachers by students. The court additionally took note of the various medical complications that could possibly result from pregnancy that would be injurious to the teacher.

It was the opinion of the court that all of this evidence indicated that the primary purpose of the regulation was to protect the continuity of the classroom program and to keep disruption of the program to a minimum. Also, that the other portions of the policy, the requirement for advance notice and not returning to the classroom until a specified time, were designed for the same purpose—to preserve the continuity of the program. The notice portion was to prevent sudden leaving by the teacher and to permit the substitute to become accustomed to the classroom routine. And the provision which permits the teacher to return at the start of the semester following the child's age of three months, was designed to protect the health of the mother and child and to preserve the continuity of the classroom program. For these reasons, the court found that the regulation was entirely reasonable.

The court also ruled that the teachers were not discriminated against by reason of their sex. The court concluded that no constitutional rights of the teachers had been violated by the school board and denied their requested relief.

Virginia

Cohen v. Chesterfield County School Board
326 F.Supp. 1159
United States District Court, E.D. Virginia, Richmond Division, May 17, 1971.

A teacher brought a civil rights action against the board of education, challenging its maternity leave regulations. The teacher charged that requiring her to take a leave of absence at the end of her fifth month of pregnancy violated her constitutional rights by discriminating against her as a woman, thereby violating the equal protection clause of the Fourteenth Amendment.

On November 2, 1970, during her third year of employment, the teacher wrote to the school board that she was expecting a child about April 28, 1971, and asked that maternity leave be made effective as to her on April 1, 1971. Leave was granted, effective December 18, 1970, pursuant to the maternity leave provisions and the request of the teacher that the leave begin on the later date was denied. The basis for the board's decision was that even though the teacher was and is considered to be an excellent teacher, the board had a replacement available and felt it proper to abide by the regulation.

The court found no medical or psychological reason for the board's regulation. The court said that since no two pregnancies are alike, decisions of when a pregnant teacher should discontinue working were best left to the teacher and her doctor. In addition, the court found untenable the administrative reasons advanced by the school board in defense of the provision for a mandatory leave of absence. The reasons given, fear of pushing with resulting injury to the fetus and inability to carry out fire drills, were found by the court to be nugatory and without any empirical data. The court held that the maternity policy of the school board "denies pregnant women . . . equal protection of the laws because it treats pregnancy differently than other medical disabilities. Because pregnancy, though unique to women, is like other medical conditions, the failure to treat it as such amounts to discrimination which is without rational basis, and therefore is violative of the equal protection clause of the Fourteenth Amendment." Accordingly, the court ruled that the teacher was entitled to be put in the same position as she would have been in had she taught until April 1, 1971, with the relief including recovery of salary for the months of January, February, and March 1971, seniority entitlement, and any other rights and benefits she would have received.

LIABILITY FOR STUDENT INJURY

Kentucky

Copley v. Board of Education of Hopkins County
466 S.W.2d 952
Court of Appeals of Kentucky, May 7, 1971.

An injured school girl brought suit against the board of education, its members, the county superintendent, and the principal. She sought damages for injuries allegedly suffered when she was struck by a swing on the playground of the public school that she attended.

The complaint charged that the individual defendants were guilty of gross negligence and carelessness in operating and supervising the playground. Further, that the superintendent and the individual board members failed to exercise ordinary care in employing persons to operate and supervise the playground. The girl charged that her injuries were proximately caused by this alleged negligence.

The trial court dismissed the complaint as to all of the defendants, and the student appealed, urging that the doctrine of sovereign immunity should be abrogated and that summary judgment was improper. The appellate court refused to abrogate the doctrine of sovereign immunity and held that the board of education was correctly dismissed as a defendant. However, the appellate court ruled that the trial court erred in granting summary judgment in favor of the other defendants since the evidence before the trial court was insufficient to establish that there was no genuine issue of material fact. For this reason the decision of the trial court was reversed as to all defendants except the board of education.

Cox v. Barnes
469 S.W.2d 61
Court of Appeals of Kentucky, June 25, 1971.

The father of a deceased high-school student brought a wrongful death action against a teacher, the school athletic director, and the principal. The trial court dismissed the suit as to the principal. After a jury trial a verdict was rendered in favor of the teacher and the athletic director. The father appealed.

The student, aged 18, and other members of his senior class had been attending a class outing when the student drowned. It appeared that in October 1968, prior to this accident, the Caldwell County School Board had resolved to discontinue school-sponsored senior trips. However, the superintendent had told the principal that educational trips were permissible, and the principal authorized this outing. At a class meeting, when asked if swimming would be permitted on the outing, the principal replied that if the students were to go swimming, they would have to furnish their own lifeguard. The same was told to the faculty members who accompanied the students, one of whom served as lifeguard.

The accident occurred near a diving tank about 40 yards off shore marked with an "off limits" sign. At the time, although the faculty members were standing on the beach, all were dressed in street clothes. While the deceased student was attempting to swim to the diving tank he went under and rescue attempts by the boys accompanying him proved fruitless. Realizing that help was needed the athletic director took off his clothes and swam out but after diving many times was unable to locate the student in time to save his life.

The father argued that it was incorrect for the trial court to dismiss the suit as to the principal. The appellate court did not agree, finding no negligence on the part of the principal. The court said he had fulfilled his duty when he gave appropriate instructions and specified certain conditions under which the trip could take place.

With regard to the two faculty members present, the father claimed that they violated the order of the board and the oral instructions of the principal. He charged derelictions in that the students should not have been allowed in the water so soon after lunch, that the signs should have been obeyed, that the faculty members failed to check the water conditions, failed to have lifesaving equipment available and failed to properly observe the activities of the students. The father also objected to the lack of an instruction to the jury as to whether the faculty members had the last clear chance to save the student. The appellate court

found no error in the jury instructions because there was no evidence that the faculty members had time to save the boy after the peril in which he placed himself was discovered or discoverable.

The appellate court concluded that under the evidence of this case the jury was entitled to believe that there was contributory negligence on the part of the student. The lower court decision dismissing the action was affirmed.

Louisiana

McDonald v. Terrebonne Parish School Board
253 So.2d 558
Court of Appeal of Louisiana, First Circuit,
September 2, 1971; rehearing denied November 3, 1971.

An elementary-school pupil in a special education class lost his eye as the result of an altercation with another pupil. His parents brought suit against the school board, the teacher, the principal, and the parents of the other boy. The trial court granted judgment for the defendants and the parents appealed.

It appeared from the evidence that the injured boy had knocked over some blocks that the other boy was playing with and a scuffle took place. The teacher was out of the room at the time and the pupils were at a play period. The other boy proceeded into the hall and picked up a broom, told the injured pupil that he would throw it if he came any closer, and when the injured boy did advance, he threw the broom. The broom bounced and hit him in the face, causing the loss of his eye.

The court observed that in dealing with the intentional tort of a minor child, the case here, the parents are responsible for the injuries inflicted but only when there is fault on the part of the child. Here the court was unable to find legal fault in the act committed by the boy who threw the broom. By the injured boy's own testimony, he was the instigator of the initial act which began the chain of events. He continued in the role of the aggressor by following the other, smaller boy into the hall and by refusing to halt when warned the broom would be thrown. Since the other boy acted in self defense, he would not be liable unless he used force beyond what was reasonably necessary to protect himself. Despite the tragic consequences, the appellate court held that throwing the broom was not excessive force in self-defense. Therefore, the action against the boy and his parents was dismissed.

Likewise dismissed was the action against the school board, the teacher, and the principal. The parents argued that the teacher was unqualified to teach special education classes, and that the teacher and the principal knew of the other pupil's propensities for fighting and negligently failed to take special precautions. The court noted that the teacher, who was a qualified Spanish teacher, had received workshop training in special education. Neither allowing her to teach the special education class, nor her momentary absence from the classroom after asking the teacher next door to supervise her pupils, amounted to negligence on her part or the part of the school board. "The fact that each student is not personally supervised every moment of each school day does not constitute fault on the part of the School Board or its employees."

Lastly, the court said that while the pupil who inflicted the injury had been involved in fights before, there were others who had been involved in more incidents and he was not the worst pupil in the school. In view of the fact that this was a special education class, the court stated that a record of perfect conduct would be most unusual. The decision of the trial court in favor of the defendants and against the parents of the injured pupil was affirmed.

Maryland

Duncan v. Koustenis
271 A.2d 547
Court of Appeals of Maryland,
December 11, 1970.

An injured junior high-school student appealed from the trial court dismissal of his suit against the teacher. The student had had parts of two fingers severed in industrial arts class, allegedly because of the negligence of the teacher in improperly securing a guard on an automatic planer. The only question on appeal was whether the doctrine of sovereign immunity of the school board extended to the teacher.

The appellate court reviewed the history of the sovereign immunity doctrine as it relates to governmental bodies and concluded that it was so deeply ingrained in the law of Maryland that the court would not alter it absent legislative mandate. In Maryland, the court said, governmental immunity also extends to nonmalicious acts of *public officials* as opposed to *public employees,* acting in a discretionary as opposed to a ministerial capacity. In applying the test of who is a public official, the court found it to be clear that a teacher would not qualify as a public official on these grounds: A teacher is not required to take an official oath of office, receives no commission, gives no bond, is

not commonly thought of as an officer, and does not exercise sovereign powers of government. Looking at other Maryland cases that also considered the question, the court found that those employess held to be officials held positions distinguishable from that of a teacher.

The court accordingly held that the teacher was not a public official, but was a professional contract employee and that the doctrine of sovereign immunity did not extend to him. The judgment of the trial court was reversed and the case remanded for further proceedings.

New York

Armlin v. Board of Education of Middleburg Central School District
320 N.Y.S.2d 402
Supreme Court of New York, Appellate Division, Third Department, April 27, 1971.

The school district and the physical education teacher appealed from a jury verdict in favor of an injured pupil. The fifth-grader was injured when she fell or jumped while performing on rings in a physical education class. The facts were in dispute at the trial, but there was proof that the rings were above the reach of the girls in the class, and two "spotters" were assigned to break a fall should a mishap occur. It appeared that the teacher had not seen the fall, had never demonstrated any stunts on the equipment, and the "spotters" were not instructed on how to perform. Additionally, the state physical education syllabus for the type of equipment and age of the pupils stated: "The apparatus and the class should be so placed as to be entirely in view of the teacher."

The trial court charged the jury that the pupil had the burden of proving that the teacher was negligent in conducting, instructing, or supervising the class and restricted the liability of the school district to acts of its teacher within the scope of her employment, there having been no exception to this charge. The appellate court found that the jury could have reached its verdict on a fair interpretation of the evidence. The judgment in favor of the pupil was affirmed.

MISCELLANEOUS

California

MacKay v. Rafferty
321 F.Supp. 1177
United States District Court, N.D. California,
June 24, 1970. Judgment affirmed, 91 S.Ct. 355,
December 14, 1970.

An action was brought challenging the constitutionality of the teacher's loyalty oath. A three-judge district court was convened to hear the case.

The oath required the teacher, as a condition of certification, to swear or affirm to support the state and federal constitutions and the laws of the United States and California and to "promote respect for the flag and . . .respect for law and order and. . .allegiance to the government of the United States of America."

The court found the oath to be essentially indistinguishable from one previously declared unconstitutional by the Supreme Court of the United States in *Baggett v. Bullitt* (377 U.S. 360 (1964)). Accordingly, the court declared the loyalty oath statute unconstitutional and enjoined the state school officials from enforcing it directly or indirectly.

Monroe v. Trustees of the California State Colleges
95 Cal. Rptr. 704
Court of Appeal of California, Second District,
Division 3, June 15, 1971.

A state college professor who was dismissed in 1950 for refusing to sign the loyalty oath on constitutional grounds, sought reinstatement as a result of the 1967 California Supreme Court decision holding the oath unconstitutional.

Following the professor's dismissal in 1950, the oath was upheld by the highest state court in a suit brought by another party. In 1953, the state personnel board upheld the professor's dismissal based on the decision in that case. However, the oath was declared unconstitutional in 1967, in *Vogel v. County of Los Angeles* (434 P.2d 161). The professor immediately applied for reinstatement. This was denied and suit was brought. The trial court dismissed the complaint and this appeal followed.

The professor contended that *Vogel* should be given retroactive application and, therefore, he was entitled to reinstatement, lost salary, and restoration of his pension rights. The trustees denied these contentions, and claimed that suit was barred by the statute of limitations and by laches, and that they were immune from liability for damages.

In advancing the defense of laches, the trustees argued that they had been prejudiced by the 15-year delay in bringing suit, and that this delay was *per se* unreasonable. The court noted that this was no longer the law in cases involving suits for reinstatement brought by public employees. Unreasonable delay without more is not a defense.

The trustees then contended that the statute of limitations barred suits not brought within one year, or three years, depending on which statute applies. The professor maintained that his cause of action did not arise until *Vogel* declared the oath unconstitutional. He pointed out that his discharge in 1950 and the state action upholding it in 1953 were lawful and proper at that time under judicial decisions. He argued that it would have been useless for him to bring suit then and that only after the trustees refused to reinstate him following *Vogel* did his cause of action arise. The court did not agree, saying that "[t]he circumstances presented do not demonstrate legal or physical impossibility, practical impossibility, or futility. The courts have been available to petitioner at all times." The court said that had the professor brought suit within the time period allowed, he might have been the one to have the oath declared unconstitutional. Instead he sat idly by, allowing his damages to accrue and waiting for someone else to bring suit.

The professor argued that it would have been impossible for him to bring suit because he had not met the requirements to teach at that time, for he had not signed the loyalty oath and, therefore, the statute of limitations had not begun to run until the oath was struck down. The court again disagreed, stating that the professor's refusal to sign the oath in no way prevented him from seeking judicial relief. Also rejected by the court was the contention of the professor that the board of trustees was stopped from asserting the statute of limi-

tations since there was no allegation that the trustees did anything to induce the professor not to seek judicial relief during the statutory period.

The final contention of the professor was that despite the statute of limitations, *Vogel* should be given retroactive application because it was a case vindicating a constitutional right previously denied. To support this contention he relied on recent cases involving constitutional rights of criminal defendants that were made retroactive. Reviewing numerous cases discussing the retroactive application of decisions, the appellate court concluded that *Vogel* should not be applied retroactively. The court said that it had not found any instance of retroactivity where a First Amendment right was involved. Also, the purpose of *Vogel* was not, as asserted by the professor, to protect free speech and to expunge a "judgment of disloyalty" against him but rather to protect future applicants for state employment from having to condition their employment upon an oath. Additionally, other cases did not involve the statute of limitations.

On the conclusion that the 1953 decision of the state personnel board had long since become final and that the present proceeding was barred by the statute of limitations, the appellate court affirmed the trial court decision dismissing the professor's claim.

NOTE: On December 30, 1971, the Supreme Court of California reversed this decision. 491 P.2d 1105.

Patterson v. Commissioner of Internal Revenue
436 F.2d 359
United States Court of Appeals, Ninth Circuit, January 12, 1971.

An elementary-school teacher deducted from his 1963 income tax return as ordinary and necessary business expenses amounts allegedly incurred in (a) doing research toward a doctoral degree in education and (b) equipping and operating a special room at his school to provide pupils with supplemental learning experiences. The deductions were disallowed by the Commissioner of Internal Revenue, and the teacher was assessed a deficiency. The teacher appealed to the Tax Court which upheld the commissioner and disallowed the deductions on two grounds: that the expenditures were not, as a matter of law, deductible; and that the teacher failed to substantiate the amount of the expenditures. The teacher appealed further.

The appellate court held that in view of certain concessions made by the Government on appeal, there was reason to believe that the Tax Court ruling that the expenditures were not deductible might be erroneous. Additionally, the teacher stated that he had the receipts to document his expenditures and that he had withheld them from the Tax Court on the mistaken belief that the commissioner already had sufficient information which the commissioner should have produced in the Tax Court.

In view of the circumstances, the appellate court remanded the case to the Tax Court for further consideration and suggested that the teacher be permitted to produce acceptable evidence of the claimed expenditures.

Florida

Board of Public Instruction of Dade County v. Dade County Classroom Teachers' Association
243 So.2d 210
District Court of Appeal of Florida, Third District, January 19, 1971; rehearing denied February 8, 1971.

The Dade County board of public instruction appealed from a judgment making final a preliminary injunction sought and obtained by the teachers association. The injunction barred the school board from utilizing "the National Teachers' Examination or graduate record examination or national achievement tests, or other similar examinations or courses in lieu thereof, as a condition of appointment, reappointment or salary purposes."

The school board had sought to administer the National Teachers' Examination (NTE) to nontenure teachers and require a passing score as a condition of reappointment. On appeal the board asserted that requiring the examination was a proper exercise of its unquestioned power to establish minimum standards for the schools under its jurisdiction and its instructional personnel. On review of the pertinent state law, the appellate court found that from 1961 until 1967, a minimum score of 500 on the NTE was a condition of receiving a certificate or advancing in certificate rank, but that this portion of the statute was deleted in 1967 by an amendment which recited that this requirement was also eliminated for "continuing contracts."

The appellate court ruled that since state law sets forth the requirements for the issuance of certificates and continuing contracts (tenure) and it does not require the taking and passing of the NTE, the local board could not impose this requirement. Therefore, the portion of the injunction barring the school board from requiring nontenure teachers to take and pass the NTE would be affirmed. However, since to obtain continuing con-

tract status, a teacher must have been recommended by the superintendent based on successful performance of duties and demonstration of professional competence, the appellate court ruled that the language in the injunction barring the graduate record examinations, national achievement tests, or other similar examinations or courses was too broad and was not at issue before the trial court. Accordingly, this portion of the injunction was stricken.

Connell v. Higginbotham
91 S.Ct. 1772
Supreme Court of the United States,
June 7, 1971.

(See *Teacher's Day in Court: Review of 1970,* p. 72.)

A three-judge federal district court upheld part and struck down part of the Florida loyalty oath required of teachers and other state employees and directed that salary be paid to a teacher who had served for a time without pay and who then had been dismissed for failure to sign the oath. The teacher then appealed to the Supreme Court of the United States.

The first section of the oath upheld by the district court required the taker to pledge to support the state and federal Constitutions. The Supreme Court said that this requirement demands no more of Florida public employees than is required of all state and federal officers, and noted that sections such as this in other oaths had been previously upheld and that their validity was settled.

The second section upheld by the district court required the taker to swear or affirm that "I do not believe in the overthrow of the government of the United States or of the State of Florida by force or violence." The Supreme court held that this portion fell "within the ambit of decisions of this Court proscribing summary dismissal from public employment without hearing or inquiry required by due process." Therefore, this portion of the oath could not stand.

Louisiana

Adcock v. Red River Parish School Board
250 So.2d 246
Court of Appeal of Louisiana, Second Circuit,
June 22, 1971.

A retired teacher sought payment of 21 days of accrued sick leave at her rate of pay as of retirement. The school board appealed from a court judgment in favor of the teacher.

The school board maintained that despite a statute requiring payment of unused sick leave, it had no responsibility to pay the money to the teacher since the legislature had never appropriated funds. The law had been amended in 1966 to make the payment of unused sick leave mandatory where it had been discretionary. The amendment also raised the maximum number of days that could be accumulated from 25 to 45 and provided state funding for the additional 20 days.

The appellate court held that the statute clearly contemplated state funding for the additional 20 days over and above the 25 days that could already be accumulated, and did not affect or have any bearing on the mandatory obligation of a school board to pay accrued sick leave up to 25 days upon death or retirement of a teacher. Therefore, since the teacher was seeking payment for only 21 days' leave, the provisions relating to an appropriation of funds by the legislature had no bearing on the school board's liability to the teacher. For these reasons the judgment of the trial court in favor of the teacher was affirmed.

Michigan

Park v. Lansing School District
189 N.W.2d 60
Court of Appeals of Michigan, Division 2,
April 23, 1971.

Nontenured administrative employees of the Lansing school district were not rehired for failure to comply with a policy requiring them to reside within the school district. The policy was applicable to all administrative employees except those persons who held administrative positions prior to July 1, 1962, and had continuously resided outside the district since that time. The employees had sought to enjoin the enforcement of the regulation. The trial court dismissed their complaint and they appealed.

The employees' first contention on appeal was that the policy denied them due process. The appellate court did not agree, holding that on the record the question of the beneficial effect of the residency requirement was reasonably debatable and, therefore, substantive due process was not violated. The next contention of the employees was that they were denied equal protection because there was no rational reason for the July 1, 1962, cut-off date. Since the trial court had not ruled on the reasonableness of the justification for the cut-off date, the appellate court reversed the decision

and remanded the case for findings of fact and conclusions of law on whether the cut-off date bears some reasonable relation to the intended purpose of the residence policy rule. If it did, the appellate court said, the rule would be valid.

New Hampshire

Donnelly v. City of Manchester
274 A.2d 789
Supreme Court of New Hampshire, Hillsborough, February 26, 1971.

A teacher who resided in Derry and taught in the Manchester school system sought to have declared invalid a city ordinance which required all classified employees of the city of Manchester, including teachers, to live in the city or become residents within 12 months of their employment unless granted a special permit.

In passing on the validity of the ordinance, the court said that the right of every citizen to live where he wants and to travel freely, not only within the state but across its borders, is a fundamental right which is guaranteed by the state and federal constitutions. There was no question in the mind of the court that the city ordinance placed a restriction on this fundamental right. This being the case, the ordinance could be upheld only if the requirement that employees live within the city served a public interest important enought to justify the restriction on the private right. The court found nothing in the record which would justify the application of the restriction to school teachers, since their qualifications were certified by the state and once certified were entitled to pursue their calling anywhere in the state, and their qualifications to perform their important function did not depend on their place of residence.

It had been argued that those who were employed by the city should help support the cost of their government by contributing to the economy of the city, and its tax base. But, the court said, city employees earn their salaries and any governmental interest served by forcing them to be residents for financial benefit is slight compared to the interference with their private rights.

The court declared the ordinance invalid in that it constituted an unconstitutional exercise of governmental power.

New Jersey

Visotcky v. City Council of the City of Garfield
273 A.2d 597
Superior Court of New Jersey, Appellate Division, February 3, 1971.

The outgoing mayor of the city of Garfield appointed a teacher to a vacancy on the board of education. The teacher took office on December 31, 1969. On January 5, 1970, the new mayor appointed another person (plaintiff) to the same vacancy. The plaintiff took his oath of office the same day. In this suit the appointment of the teacher was challenged as illegal under state law because he was a teacher in the same school system in which he was appointed a school-board member. The trial court ruled that the positions were incompatible, and the teacher appealed.

At the time of the appointment the teacher was under contract for the 1969-70 school year and in fact continued to teach and be paid until the end of the school year. Affirming the lower court decision that the teacher's appointment as a school-board member was invalid from its inception, the appellate court held that two positions of teacher and school board member in the same school district were incompatible. The appellate court said that the teacher is an employee whereas the board of education is the employer and that there are many potential conflicts of interest between the two.

The teacher also argued that his acceptance of the board membership vacated his teaching position rather than prevented his appointment to the board. To support this contention, the teacher relied on a New Jersey case holding that acceptance of the second office vacates the first. The appellate court distinguished the cited case from the one before it because here the teacher was bound by his contract for the school year and not legally free to abandon one public job for another. Additionally, the teacher kept his teaching position for the remainder of the term and continued to be paid. While he offered to resign as a teacher, the offer was conditioned upon an adverse determination and was never effectively carried out.

New York

Community School Board 3 of the City of New York v. Board of Education of the City of New York
326 N.Y.S.2d 130
Supreme Court of New York, Special Term, New York County, Part I, November 17, 1971.

The community school board brought an action against the New York City board of education to enjoin that board from making rules concerning the "excessing" of personnel. Because of budgetary stringencies, it became necessary to reduce teacher and supervisory staff in various schools in the city,

including those in District 3. There was no dispute between the parties as to those teachers who had attained tenure. However, the community board wished to treat substitute teachers on a par with probationary teachers and make the decision on who would be released on "educational criteria" based on the judgment of the community board and its superintendent on the teacher's usefulness and needs of the school rather than on any previously announced objective standard or order of priority. On the other hand, the chancellor of the city board of education had issued guidelines requiring that substitute teachers be laid off first and then probationary teachers in inverse order of seniority and that seniority be determined on a city-wide basis.

Under state law, community school boards have all of the powers and duties as the former local school board, "not inconsistent with. . .the policies established by the city board." The court found that arguments could be made on both sides for the respective positions taken by the parties. In light of these circumstances, the court was of the opinion that the question should first be considered within the educational system, by the state commissioner of education, with or without the intermediate determination of the city board of education. The court noted that the parties here were public agencies, not private parties, and that the questions involved were those of law and statutory interpretation as well as of educational policy and administration on which the commissioner could make a better informed and more flexible judgment than the court. Accordingly, the court dismissed the suit brought by the community board so that the matter could be pursued through educational channels.

Henken v. New York State Teachers' Retirement Board
316 N.Y.S.2d 564
Supreme Court of New York, Appellate Division, Third Department, December 29, 1970.

The husband of a deceased teacher sought a review of the retirement board decision denying him disability benefits as his wife's designated beneficiary. The trial court denied relief and the husband appealed.

The teacher was forced to discontinue teaching because she was suffering from cancer. On June 25, 1969, she applied for disability retirement benefits naming her husband as her beneficiary. The teacher died on July 11, 1969, and pursuant to law the retirement board paid to the husband the teacher's contributions to the retirement system and the death benefit. The retirement board refused to pay to the husband additional benefits based on the alleged disability retirement because the teacher died less than 30 days after filing her application and had selected no option plan for the payment of the benefits, and because the board had not made any ruling on her application.

The husband argued that the 30-day rule could not be adopted under state law. The appellate court rejected this contention, holding that the rule was not unreasonable or in excess of the authority of the retirement board. Nor was the fact that the teacher was incapacitated by terminal cancer equivalent to a finding by the board that she was disabled. Accordingly, the court held that the teacher had never attained disability retirement status, and, therefore, her husband was properly denied the benefits.

The judgment of the trial court in favor of the board was affirmed.

State University of New York v. Denton
316 N.Y.S.2d 297
Supreme Court of New York, Appellate Division, Fourth Department, November 5, 1970.

Forty-five members of the faculty at the State University of New York at Buffalo appealed from their conviction of criminal contempt of court for violation of a preliminary injunction. The injunction had been issued following a period of student protest to which these faculty members were not a party, that necessitated the city police being called onto the campus. The university had commenced the action for the injunction against 13 named students, and John Doe, and Jane Doe. The issued order of March 5, 1970, enjoined the students "and all other persons receiving notice of this preliminary injunction, whether acting individually or in concert" from acting so as to disrupt or interfere with the normal operation of the university, from blocking ingress or egress from properties, or from employing force or violence, or threatening the same. The injunction was served by posting copies at various locations on campus.

On March 15, 1970, ten days after the issuance of the preliminary injunction, the 45 faculty members entered the office of the university president and refused to leave when asked to do so. It was for this action that they were found guilty of criminal contempt. These faculty members were not among the defendants named in the injunction action, were not parties to the application for the temporary injunction, and were never personally served with the order of March 5, 1970.

The major issue on appeal was whether the faculty members were bound by the injunction, and accordingly whether they could be found guilty for its violation. In answering these questions in the negative, the court quoted from a landmark New York decision wherein the highest New York court considered the statutory authority for the issuance of such injuctions, and said: "In terms the code authorizes an injunction against the defendant only, not the whole world . . . . Therefore, so far as the order purported to restrain all other persons having knowledge of the injuntion, this provision was inoperative to enlarge its effect. It is true that persons not parties to the action may be bound by an injunction if they have knowledge of it, provided they are servants or agents of the defendants, or act in collusion or combination with them . . . .Persons, however, who are not connected in any way with the parties to the action, are not restrained by the order of the court."

Measured by these criteria, the appellate court held in the instant case that the faculty members were not made subject to the preliminary injunction by the language "all persons receiving notice of this preliminary injunction." The court found no basis on the facts presented for the conclusion that the faculty members, who had no opportunity to be heard in the injunction proceedings were bound by it and accordingly subject to punishment for violation of the order. The injunction was specifically aimed at student conduct, the court said, and there was no evidence that the students had violated the injunction. The court also found the evidence legally insufficient to establish that the faculty members were either agents of or acted in collusion with the students. Consequently, even if the faculty did have knowledge of the provisions of the injunction, they could not be held in contempt for their independent action in disobeying it.

The university offered proof that when the faculty members entered the president's office they handed a staff member a paper that stated they intended to remain in the office until the police were removed from the campus and that they were in sympathy with the general purposes of the student strike. The university argued that this established that they acted in concert with the named students. The appellate court disagreed, saying that sympathy on the part of the faculty was insufficient to establish that the action was accomplished in concert and/or collusion with the students.

Having concluded that the faculty members were not bound by the injunction, the court reversed the judgment of the lower court holding the faculty members in contempt of court for violation of the injunction and dismissed the case.

Rhode Island

Providence Teachers Union, Local 958 v. School Committee of the City of Providence
276 A.2d 762
Supreme Court of Rhode Island,
April 23, 1971.

(See page 109.) This case involved severance pay (based on accumulated unused sick leave) paid as retirement benefits.

Tennessee

City of Kingsport v. Lay
459 S.W.2d 786
Court of Appeals of Tennessee, Eastern Section,
June 15, 1970; certiorari denied, Supreme Court of Tennessee, November 2, 1970.

In June 1969, the assistant superintendent of education in Kingsport was elected to the position of alderman of the city of Kingsport and sworn in at an annual salary of $250. Shortly thereafter, city officials sought a declaratory judgment as to whether the assistant superintendent could be paid the salaries due him in both positions. The assistant superintendent denied any conflict between the two positions and asserted that he should be paid for both. At the time of trial and appeal the assistant superintendent was serving in both capacities and was not being paid for either. The trial court ruled that under an applicable ordinance and state statute he could not serve concurrently in the two positions and that he could be paid only his salary as alderman, not as superintendent. The superintendent appealed from this decision.

The city ordinance provided, among other things, that no alderman, officer, or employee of the city shall be connected with or have any interest, direct or indirect, in any contract with the city. Further, the state statute provided that no person holding office under any municipal corporation could "be capable of contracting with such corporation for the performance of any work which is to be paid for out of the treasury."

The appellate court found conflicting duties and responsibilities in the two positions. As alderman, the court said, the assistant superintendent would be in the position of having to review budgeted items that he had a part in formulating in his administrative position. Indirectly, if not directly, the superintendent had an interest in the amount approved for salaries, the court said, and it was only natural that as alderman, he would favor the approval of budgeted items relating to projects

with which he was personally involved as assistant superintendent.

While agreeing with the trial court that the ordinance and the statute were applicable and that the two positions were incompatible, the appellate court could not agree that the superintendent's contract with the school board, made before he was elected alderman, was abrogated by his subsequent election as alderman. The rights of the parties, the appellate court said, are to be judged as of the date of the contract, and the board to which he was elected could not modify the contract as to either duties or compensation. The effect of the appellate court holding was that the assistant superintendent could not be paid any sum as salary under any contract made with the board of education after the 1969-70 school year, but for that year he was entitled to both salaries.

Texas

Boyett v. City of College Station
465 S.W.2d 203
Court of Civil Appeals of Texas, Houston (1st Dist.), March 4, 1971; rehearing denied April 8, 1971.

An appeal was taken from the granting of a declaratory judgment by the trial court in Brazos County. That court had held that employees of Texas A. & M. University are eligible to hold non-salaried city council positions with the City of College Station and to receive their salaries from the University while doing so.

It was uncontroverted that more than a month prior to the filing of the Brazos County suit, a similar suit had been filed in Travis County by taxpayers seeking a declaratory judgment as to whether the state comptroller is prohibited by the Texas Constitution from paying persons serving concurrently as members of the faculty or staff of the University and as members of the city council of the City of College Station. That case had been set for trial but not heard as of the filing of this suit. The appeal in this instance was brought by the plaintiffs in the Travis County suit asserting that the Brazos County trial court erred in overruling their pleas of abatement.

The appellate court held that the Brazos County court should not have overruled the pleas of abatement in view of the pending Travis County suit. The appellate court found that the essential question was the same in both suits—whether the state constitution permitted the faculty members to be paid their university salaries while holding elective positions in the city government. Since the issue was essentially the same, the jurisdiction of the Travis County court attached when the first suit was filed there, and that court had the power to permit the pleadings to be amplified, new parties to be added if necessary, and to determine all essential questions. While not all of the parties in both suits were identical, the appellate court did not consider this significant. Nor did that court think it of consequence that one suit was a class action and the other was not.

The decision of the Brazos County trial court was reversed and the cause ordered abated.

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